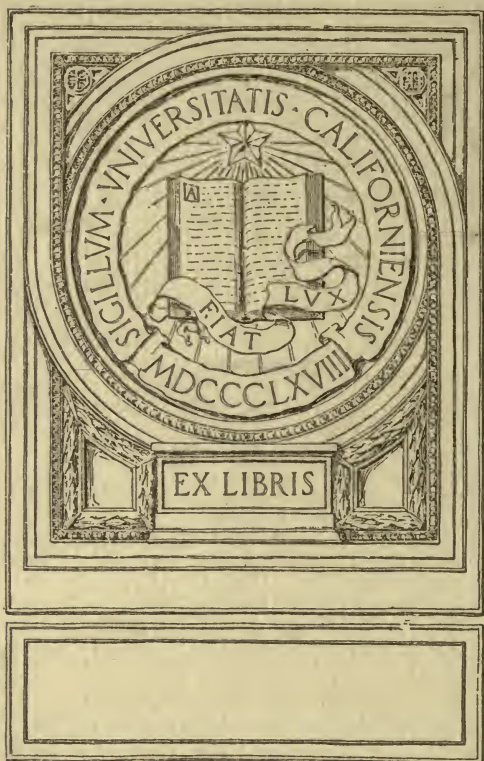








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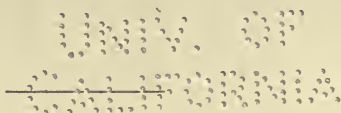
LEGAL ANTIQUITIES

A COLLECTION OF ESSAYS UPON
ANCIENT LAWS AND
CUSTOMS

BY

EDW. J. WHITE

Editor Third Edition "Tiedeman, on Real Property," Author
of "Mines and Mining Remedies," "Personal Injuries On
Railroads," "The Law in Shakespeare," Etc.



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HISTORY I

TO THE
LIBRARY OF THE
MISSOURI BOTANICAL GARDEN

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TO THE MEMORY OF MY
MOTHER,

WHOSE FAITH IN HUMANITY MADE HER ALWAYS CHARITABLE
FOR THE FRAILTIES OF THE PAST AND HOPEFUL FOR
THE FUTURE; WHOSE TENDER DEVOTION, SAC-
RIFICES AND ENCOURAGEMENT ARE THE
DEAREST RECOLLECTIONS OF MY LIFE,
THESE PAGES ARE AFFECTION-
ATELY INSCRIBED.

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INTRODUCTION.

In this age of ours, distinguished principally for the variety of the inventions and the fast and furious pace at which we move; when the motto of the Captains of Industry, being paraphrased, is simply, that "Motion means Money"; when the politicians vie with each other in their attempts to cater to every passing popular fantasy and the great mass of the citizenship is too much engrossed in the commercial life of the day, to study or analyze the history of our institutions, but the demand of the times is for continuous change, in keeping with the moving spirit of the age, it is advisable that we should occasionally stop and consider the lessons of the past, lest we forget some of the valuable information of antiquity.

There was perhaps never a time, in the history of our country, when the general feeling of individual unrest has brought about such disrespect for our existing institutions.

The development of the great body of our law, from the brutalities of a barbarous period, with the ever changing ideas of civilization, to meet the needs of the people, and the higher standards obtaining, has been gradual but certain. In so far as we have actually progressed, therefore, we should be satisfied with the progress made and should be slow to return to the customs or remedies which a past civilization found unavailing, lest all our progress should prove but a dim phantom of the imagination.

A profitable lesson can oftentimes be gleaned from a study of the past and when an innovation demanded is one that experience has proven fallacious, it is puerile to refuse to profit by this lesson, for even "a burnt child" will avoid the fire.

Undoubtedly much of the remedial and substantive law of our period needs revision, to the end that simplicity may be attained and the interminable delays, resulting from the present practice, incidental to too many new trials and other objectionable methods, obviated. But this revision should be cautiously made, so as not to impair the efficiency of the great body of the law that the wisdom of the past has demonstrated to be thoroughly consistent with the individual and national welfare.

The first attempt to simplify procedure in the United States, by the adoption of the New York Code, was only sixty-five years ago and a majority of the States adopted such legislation since the Civil War. The common law practice was greatly improved and simplified by this concerted action of the States and unquestionably there are many things that can yet be improved in the remedial procedure of the present day.

But the prevalent idea that an increased volume of statute law will furnish a panacea for all existing evils, is radically wrong. The beneficent rules of conduct, crystallized into law, by custom, because consistent with the needs of the people, in the evolution of civilization, should be jealously preserved against the unscientific fragmentary legislation, too often reflecting the unjust and unequal demands of an aroused public sentiment, shaped by designing politicians, rather than by

the "cool examiner of the public pulse," prompted by beneficent objects.

Legislation, of course, is the simplest way of modifying or repealing law, but legislators, in our country, frequently act without adequate information or legal training and the most salutary rule of conduct, in such hands, might be supplanted by the most unequal and unjust law.

All that is old is not necessarily good, but just because it is old, is not a sufficient reason for discarding it. Legislation may become as limitless as the imagination of the legislator and unless properly advised, it would be inimical to the interests of the State or Nation.

When legislation is advised by any considerable number of the leaders of any political party, which history has shown in other countries to have been productive of the most deplorable consequences, then it is time to leave the issues of the present long enough to study the lessons of the past.

In conning the "Marriage Laws and Customs" of past ages, we can, in some measure, congratulate ourselves that our Marriage Laws are better than those of the past centuries, yet when we consider the large class of "Predestined Lost" ones, born as a result of diseased and mismated marriages, and when we give but a cursory examination to the divorce statistics, we can see that we have grave need for better laws on this most important of all subjects, the regulation of the relation, through which the standards of citizenship are controlled.

The Witch-Craze, in Europe and America, which resulted in the wholesale slaughter of innocents, through

a blind faith by the Courts, in the popular standards of the people, whereby unprovable offenses, were permitted to be established in utter disregard of the rules of evidence, and a vacillating, dependent judiciary helped for centuries, to perpetrate the most intolerable outrages against civilization, illustrates the necessity of an absolutely independent judiciary, free from the dominating influence of the frenzy of the public and a constant adherence to the rules of evidence and the proper legal ideals, in the administration of the law.

The Judicial Recall, as we see it in ancient history, is another of the present popular fantasies to be avoided. Hammurabi tried this system 2,500 years before Christ's time, when witches were convicted according to their ability to swim a torrent and surgeons were mutilated, by the loss of a hand, for an unsuccessful operation. It was also tried in ancient Athens and because of some unpopular decision, the "most just Judge" of that city, Aristides, was recalled, and some votes were cast against him, because the voters were simply tired of hearing him called "The Just." Aristotle's evidence is to the effect that this law brought about the most deplorable consequences, in Greece, Persia and other antique nations, where it was in vogue. The old Anglo-Saxon practice of preferring the charge of "False Judgment" against the judge whose decision was challenged, who was recalled, if this charge was sustained, was found inimical to the interest of the Government and since the English Judges were emancipated from the narrow groove of an unskilled public sentiment and were appointed for life, the majesty of the law has been revered in no other country on the face

of the earth, as it has been in England. This is testimony worth considering, for, judging the future by the past, if this practice undermined the judicial institutions of other countries, it would also undermine our own judicial system and ought to be avoided. The demand, by the ill-formed, for the destruction of the independence of the Judiciary, in utter disregard of the lessons of the past and the wisdom of our fathers, should be considered, therefore, along with this object lesson furnished by ancient history and by penetrating into the records of the past centuries, it will be seen that to adopt such a law would mean to return to the "Leges Barbarorum" of the past.

In the discharge of their impartial functions, the judges of the peoples courts, have nothing to do with popular standards; it is with right and wrong, according to the just and equal standards of the law that they have to deal and it is as true to-day, as when the patriarch Moses, admonished the judges of ancient Israel, that, in the prerogative of the judgment-seat, "Thou shalt not follow a multitude to do evil; neither shalt thou speak in a cause to decline after many, to wrest judgment."¹

The work of the judges is in private places; they have no favors to bestow, no rewards of office to distribute. It is frequently the business of the charlatan to misconstrue and misinterpret their ablest judgments and as the courts are the final repositories of the peoples rights, when the public clamor is the loudest for the sacrifice of individual right, then the true judicial character performs its highest office, in withstanding all as-

¹ Exodus, XXIII., 2.

saults by the ill-informed, upon the ramparts of the Temple of Justice.

With the wide-spread demand for the "judicial recall" we find the true modern standard, in this regard, reflected in the recent strong language of an upright Texas Judge, who, in the course of his opinion, observed:

"I have made it the rule of my judicial life, and shall continue to do so, while invested with the authority pertaining to the office I hold, to decide questions as I understand them, after as careful an investigation as my capacity affords, without reference to what public opinion may be. I do and shall continue to regard the law as superior to the ebullition of outraged feeling, when communities are shocked by crime. When cases arising under such circumstances, have reached this court, my voice and my vote shall, in the future, as in the past, be given for the upholding of the law, not bending it to public sentiment. The stability of the institutions of this government depends upon adherence to the law, as it is written, and not on the fluctuating strenuousness of eruptive ebullitions of popular sentiment."²

This course alone is consistent with the attainment of the just idea of government, by the judicial department, and peculiarly of this department, because the ideals of the unskilled are not always consistent with the standards of scientific jurisprudence. A subservient judiciary, dependent upon the vacillating ebullitions of an unstable public sentiment would bring about a subversion of the important functions of this department of government, just as it did when popular sentiment controlled the incumbents of the judgment seat, in ancient

²Judge Davidson, of Texas, in *Ex parte Martinez*, 145 S. W. Rep. 959, 1023.

Babylon, in Greece and in the England of old Anglo-Saxon days.

“Trial by Ordeal,” “Trial by Battle,” the dreadful “*Peine forte et dure*,” and “Wager of Law,” are all instructive procedures of a past civilization, from which important lessons can be drawn.

“Trial by Ordeal,” “Trial by Battle” and “Wager of Law,” as institutions of a primitive people, struggling for right, are but expressions of a misguided and abortive effort to attain correct judicial ideals, by false and inaccurate standards. Before the evolution of the race had attained to the ideals, when tribunals for the trial of questions of right and wrong, according to the actual facts in each concrete case, had been established, such issues were determined by the ability of the accused, in criminal cases, or the appellee, in civil suits, of a certain character to accomplish certain ordeals, requiring almost superhuman strength or fortitude, or to withstand, by individual combat, the strength of the opposite party to the issue waged. Of course, with such ideals, might alone controled the right and by the “Wager of Law,” the other alternative used in the quest for right, the popularity of the principal or his ability to secure oath-helpers, to assist him in swearing away the given crime or debt, resolved the conclusion upon a given issue, into a simple question of the elasticity of the consciences of the principal and his friends, who were always able to win their cause, after issue waged, by a sufficiently strong and an adequate number of oaths.

On the abolition of the “Ordeal,” in the thirteenth century, when the accused, in a criminal charge, refused to submit to a “Trial by Battle,” the courts were un-

able to force a plea, without some amendment of the procedure and adroit criminal lawyers, for some years, availed themselves of this subterfuge, of having their clients stand mute and refuse to plead, when their conviction of felony would be certain to result and the courts found themselves helpless to avoid a condition, which resulted in the crowding of the jails and prisons, with prisoners, afraid to submit to the "Trial by Battle" and refusing to plead to the indictments filed against them. This, in time, brought about the greatest judicial severity in the case of prisoners standing mute and finally the practice, in all such cases, came to be to apply a heavy weight upon the chest of the accused and to literally "press him to death," if he persisted in his obstinacy. For centuries, in England, this custom continued, and thousands were "pressed to death," for standing mute, when arraigned upon a criminal charge. The same practice was followed in the witch persecutions in this country, in the seventeenth century and when we consider that these abominable customs obtained, until the past century, we are, indeed, to be congratulated that our present procedure, with all of its imperfections, has risen to the standard where it is able to reject such inhuman and barbarous practices.

The "Benefit of Clergy" and "Privilege of Sanctuary," illustrate the attempt of the Church to mollify, as it were, the cruelties resulting from the harsh administration of the criminal laws of mediæval times, in England, by the secular courts and had it not been for these beneficent institutions—which were frequently utilized to protect criminals of the worst sort—there would have been no alleviation for the sufferings of the ac-

cused, and the large number of innocents who embraced the plea of Clergy, or sought the sacred precincts of the protected Sanctuary, would, along with the guilty, have paid the penalty for living in a dark and benighted age, unable to protect the innocent from the power of the mighty, when accused of wrong-doing.

When we read of the "Ancient Punishments" of the past centuries, we can but feel a satisfaction that the struggle of our English forefathers of mediaeval times, by herculean efforts against those in authority, adopted such fixed principles of constitutional law, as we find reflected in *Magna Charta*, and the various constitutions of our own country, preventing "cruel and unusual punishment."

Those so fortunate as to avoid the punishments of the past centuries, when death lurked in every charge filed against the poor and oppressed, must have felt a sort of consolation in being able to run the gauntlet of such barbarities and delusions, and to die a natural death, and this is no doubt why we find such evidence of jocularly, mixed with a strain of pathos running through the "Quaint and Curious Wills" and testaments of antiquity.

Some of the great painters of modern times, such as the late Sir Lawrence Alma-Tadema, have depicted scenes upon the canvas, in such manner as to make antiquity to live again before modern eyes—to resurrect, as it were, the men and women of the past centuries and to infuse new life into their bodies—so that they seem to again assume real form and being.

This comes from a close study of the subjects and a genius, almost akin to a divine gift. No such gift can

aid the lawyer, or did in this instance, who seeks to reproduce pen pictures of the antique proceedings of the past, but study of the subject is of course essential to give any tolerable idea of the obsolete laws and customs of other days.

A keen interest in these old proceedings prompted a somewhat painstaking study of many antique volumes, as a basis for the presentation of the following pages, but the duties of a quite busy professional life have prevented the exhaustive investigation that would otherwise have been given the subjects treated.

The sources of the information used in the different essays appear in notes and references throughout the work and it is to be hoped, if the usual modicum of instruction may be lacking, that some of the interest felt by the author, in tracing the old laws and customs of previous ages, may, in a measure, be shared, by the reader, who is kind enough to peruse the work.

Not nearly all the learning or the law upon any one of the subjects presented, will be found set forth in the different paragraphs pertaining to the various subjects introduced, but a general outline of each topic, with frequent illustrations from concrete cases, will appear.

None of the many legal antiquities of the Grecian States or the Roman Empire, which could be so profitably discussed, have been attempted, but only a few of the antique English laws and customs that have particularly attracted the attention of the author. These several subjects were all given cursory examinations in the preparation of the data for "Law in Shakespeare" and the superficial investigation in connection with that work, led to the more minute treatment herein. This is

the apology for the undertaking and the engrossment of professional duties is the excuse for the limited scope of the treatment accorded each subject.

With the era now existing, these old issues and customs are dead and buried out of sight and we would not be mad enough to revive them, if we could. They played no unimportant part, however, in the pathetic drama of the evolution of the race and we ought to erect monuments to their memory, as it were, and occasionally wander back to scatter flowers upon the monumental shaft, without deserting the live issues and duties at present confronting us.

When we contemplate the lessons of the past, as presented in these "Legal Antiquities," we can but realize the plain truth, expressed by William Knox, that "We are the same our fathers have been," for if we had lived and moved and had our being in the dark days when these customs obtained, we would have considered them in the same light that our fore-fathers viewed them and this should make us charitable toward these frailties and mistakes of the past; we should be comforted with the reflection that such institutions are but mile-stones of the centuries, marking the rapid progress of the race, but when we read of these customs of the men and women of antiquity, we can but realize the truth of the words of Longfellow, that

"* * * the world is very old,
And generations pass as they have passed,
A troop of shadows, moving with the sun."

CHAPTER I.

MARRIAGE LAWS AND CUSTOMS.

The term marriage was defined, in the Institutes of Justinian, as the lawful union of a man and a woman, including an inseparable association of their lives.¹

Written almost fourteen centuries ago, few, if any, of the many definitions of marriage, improve upon that given in the Institutes of this old philosopher-lawyer-Emperor of the Romans.²

As the basis of the marriage contract is the necessity of society for some rule for the appropriation of the opposite sexes to one another and the protection of that relation, when once established, it is in one form or another, the oldest institution of man and the source of our most antique laws and customs.³

The Chinese inform us that in the beginning, human beings, like other animals, without morality or community laws, wandered through the plains and forests, using their women in common; that the offspring of such unions knew their mothers, but rarely knew who their fathers were and that this custom continued among men, until the Emperor Fou-hi established the marriage custom.⁴

While the ancient "Heathen Chinese" were thus

¹ *Institutiones Justinianus*, written 527-529, A. D.

² Ringrose "Marriage Laws of the World," p. 10.

³ Tylor, "Early History of Mankind;" McLennan's "Primitive Marriage."

⁴ McLennan's "Primitive Marriage;" Ringrose, "Marriage Laws of the World," p. 7.

holding their women in common, there is evidence that among the old Teutons and Hindus, the "marriage by capture" and "rape marriages" were still recognized by law, long before the "bride-sale" or "sale marriages," so generally obtaining in ancient Assyria and Babylon, were established in Germany.⁵

Some historians claim that, in the early days of heathenry, capture was the only method used by young men for securing their brides and the supply of consorts depended upon the strength of the male, rather than the existence of "the tender passion."⁶

⁵ Tacitus, *Germania*, c. 18; II. Pollock and Maitland's *History English Law*, 364; Johns' "Babylonian and Assyrian Laws," etc.

⁶ We are told that this rude custom obtains today in "Far Cathay," *Blackwood's Magazine*, July-Dec., 1887, vol. 42, p. 671.

E. J. Woods in his book, "The Wedding Day in All Ages and Countries," claims that the old Hebrew expression of "taking a wife," arose from the custom of capture, not common to the Israelites, but common to other primitive peoples. (Vol. I, p. 9.) He quotes Plutarch, as authority for the custom of the Spartans to carry off their brides by capture. (Vol. I, pp. 40, 41.) Refers to the Rape of the Sabines (vol. I, p. 52), the "Institutes" of Menu, as providing one of the forms of marriage by capture, known to the four classes of India (vol. I, p. 124). He claims that "the capture of women prevailed among the aborigines of the Dekkan and in Afghanistan." (Vol. I, p. 137) He maintains that "In New Zealand and the Fejee and other islands of the Pacific, the custom of capture of women for wives has prevailed from the earliest times of the known history of those places." (Vol. I, p. 191.) "The form of capture is observed in the marriages of the Kalmucks, the Nogay Tartars, the Mongols, of the Ortous, in Tartary, the Circassians and the people generally of the Caucasus." (Vol. I, p. 210.) He claims that marriage by capture obtained in Poland, in the sixteenth and seventeenth centuries (vol. I, p. 220), that the seizure of wives by force obtained in Ireland (vol. II, p. 50), so if this record is true, since this custom is found to obtain in these countries so late as recent historical dates, it is not unbelievable that capture was the order of the early barbarous days in our own and other countries.

But the pictures of violence obtaining in these ancient days of heathenry are so obscured by the mists of the past and such a large field is left for the construction of ingenious theories, surrounded by romances of connubial bliss, resulting from this early custom of primitive society, that notwithstanding the general popularity of the theory of "marriage by capture," some of the most eminent authorities are inclined to deny that such a custom ever existed at all.⁷

Some writers maintain that the rights of the individual were never more clearly defined in marriage, than by primitive man, and that this is in accord with the common tendency of the male, to attribute a religious meaning to the ordinary intercourse with woman.⁸

The Biblical theory of the custom, dates from the command to our first parents, in Genesis: "Be fruitful, and multiply and replenish the earth."⁹

In the beginning, we find that from the rib, which the Lord had taken from Adam, he made a woman "*and he brought her unto the man.*"¹⁰

From Christian testimony, we have the evidence of the first book of Moses, upon the antiquity of this institution, for when Shechem, the son of Hamor, after defiling Dinah, the daughter of Leah, longed for her, in marriage, his father went to Jacob and his sons and communed with them, saying: "The soul of my son Shechem longeth for your daughter; I pray you give her him to wife. And make ye marriages with us, and

⁷ Fison and Howitt, *op. cit.* 259; Curr, *op. cit.* I, 108; Prof. Tylor; McLennan.

⁸ Crawley's "Mystic Rose," pp. 6, 147.

⁹ Genesis, I, 28.

¹⁰ Genesis, II, 22.

give your daughters unto us and take our daughters unto you.'"¹¹

So according to the Bible story, we find that the institution of marriage obtained seventeen centuries before Christ and these old patriarchs were plighting the troth of their son and daughter and talking of dowries and marriage portions, much as the parents of the twentieth century youth now arrange such matters.

There has always been three principal forms of marriage, from the earliest historical times, monogamy, or the marriage of one man to one woman at a time, polygamy, or the marriage of one man to several women at the same time, and polyandry, or the marriage of one woman to two or more husbands at the same time.¹²

Since the days of our first parents, according to the Bible story, monogamy has been the institution best suited to the progress of society and the proper evolution of the human race, for the most progressive nations of the world's history have embraced monogamy as a rule of social conduct.

The old Hebrews, however, made wonderful strides while practicing polygamy, an institution established by Lamech, in the sixth generation after Adam, which grew apace with the progress of the race, until in Solomon's time, the king had acquired a round thousand women, from the different nationalities of the world, seven hundred princesses as wives and three hundred concubines.¹³

Polygamy was also practiced in Persia and is to-day, in Turkey and other Oriental countries, but under Ro-

¹¹ XXXIV. Genesis, 8, 9.

¹² Ringrose, "Marriage and Divorce Laws," p. 10.

¹³ First Book of Kings.

man rule it slowly died out in the east. It was prohibited by Diocletian and other preceding Emperors and except in the single instance of the Mormons, in Utah, it has never reappeared in any countries subject to either the Roman or Teutonic laws.¹⁴

Polyandry no doubt had its origin in unfertile regions, in the endeavor to limit the population to the resources of the district; it is almost an obsolete custom, but is still practiced in parts of India, Thibet and Ceylon.¹⁵

The marriage customs of the Romans furnish the basis for the marriage laws of the civilized world, and even the Hebrew and Teutonic influence is small compared to that exerted upon this institution, by the Roman law. The general conception of the marriage relation, by the Romans, was an exalted one, as it was regarded as an equal partnership in the whole of life, effecting an equal distribution in both the secular and sacred rights of the individuals.¹⁶

The three forms of marriage, by the early Roman law, were (1) *Confarreatio*, consisting of a religious

¹⁴ Bryce, "Marriage and Divorce," III. Essays in Anglo-American Legal History, 784, 785; Euripides, *Androm*, vv. 173, 180; Tacitus, *Germania*, c. xvi. I.

¹⁵ Ringrose "Marriage and Divorce Laws," p. 11.

Monogamy was practiced by the Greeks and Romans as far back as our records reach. Wood's "Wedding Day in All Ages and Countries," vol. I, p. 33.

Morganatic, or "left-handed" marriages, are peculiar to Germany. They occur between men of superior and women of inferior rank and are prohibited by the Royal Marriage Law of England.

Ringrose, "Marriage and Divorce Laws of the World;" Wood's "Wedding Day in All Ages," vol. II, p. 8.

¹⁶ Bryce, "Marriage and Divorce," III. Essays in Anglo-American Legal History, 797; Modestinus in Dig. xxiii, 1, 2.

ceremony, ending in the sacrifice of an ox, and the distribution of a broken wheaten cake, by a priest; (2) *Coemptio in manum*, a conveyance or formal sale of the woman, to the man, and (3) *Usus*, or the right of a wife, by prescription, arising from the cohabitation of the wife with the husband, for one year, without an absence for over three consecutive nights.¹⁷

If the woman lived with the man without either the religious ceremony or the formal sale, she did not become his wife, unless she had lived with him for a year, without absenting herself for three consecutive nights.¹⁸

This latter form was called "passing into the hand" of her husband and until this Hand power had been created, the property rights of the wife remained unaffected by the marriage. Marriages with Hand in an early day were almost universal, however, for the women did not prefer the free marriage, which would place them, in law, outside the legal family of the husband.¹⁹ Marriages within the Levitical degrees were prohibited by the early Roman Emperors, and while first cousins might lawfully marry, until the end of the Republic,²⁰ the Emperor Theodosius prohibited their marriage under pain of death by burning.²¹

¹⁷ Ringrose, "Marriage and Divorce Laws," p. 8. The Twelve Tables fixed the period of three nights, to fix a previous custom, no doubt more uncertain. Bryce, "Marriage and Divorce," III. Essays in Anglo-American Legal History, 788.

¹⁸ *Ante idem*.

¹⁹ III. Essays in Anglo-American Legal History, p. 788.

²⁰ Tacitus, Ann. xii, 6.

²¹ III. Essays in Anglo-American Legal History, 805.

Before the end of the Republic, the *confarreatio* had practically become obsolete and was regarded as an old world curiosity, although formerly obtaining generally, in all patrician families. (III.

Uncles and nieces and aunts and nephews were prohibited from marrying, until the period of the Emperor Claudius, who desired to marry his brother's daughter, Agrippina, and so passed a decree of the Senate allowing such a marriage.²²

Concubinage was a "permitted connection," under the Roman law, from the earliest times, down to the period of the philosopher Emperor, Leo, A. D. 887 when it was prohibited by law.²³ The Justinian Code recognized the legality of the relation and fixed the legal and property status of the concubine and her progeny and various Christian Emperors, in the early days of the Empire passed laws regulating the relation known as *Concubinatus*.²⁴

The woman was left in the same relation as the law found her; she was not raised to the level of the husband and while her children were entitled to support from the father, they were not legitimate, but could inherit from the mother.²⁵ Under the Roman law, however, children born in concubinage, could be legitimated by the subsequent marriage of their parents,²⁶ and this early Roman law was the foundation for the custom obtaining in England, France, Germany, Normandy and

Essays in Anglo-American Legal History, p. 789.) The religious ceremony, used at the marriage *confarreatio*, is described in Wood's "Wedding Day in All Ages and Countries," where it is shown that the custom of the "bride-cake" is directly traceable to the cake of wheat or barley, used at this old religious ceremony. ("Wedding Day in All Ages and Countries," vol. 1, pp. 51, 52, 60, 61, vol. II., p. 224.)

²² Tacitus, Ann. xii, 5, 7.

²³ III. Essays in Anglo-American Legal History, 807.

²⁴ Code Justinian, v. 27, 5, 6; Nov. xii, 4; Nov. lxxxix, 8.

²⁵ Novella, lxxxix.

²⁶ Novella, xii, 4; lxxxix, 8.

Scotland, prior to the Norman Conquest, of legitimating the children born out of lawful wedlock, by the subsequent marriage of their parents. At the wedding of a couple having children prior to their marriage, it was the general custom, in the countries named, to place the children under a cloak, or mantle, which was also spread over the parents, and the children of such a union were thereafter known in the law, as "mantle children," to distinguish them from children regularly born in lawful wedlock.²⁷

According to Selden, this ceremony was observed, in England, when the children of John of Gaunt and Catherine Swinford were legitimated by Parliament,²⁸ and in Normandy, Duke Richard espoused Gunnora, "in Christian fashion," and "the children were covered with the mantle."²⁹

²⁷ II. Pollock and Maitland's *History English Law*, p. 397; III. *Essays in Anglo-American Legal History*, p. 808x.

²⁸ Selden, *Diss. ad. Fletam*, p. 538.

²⁹ Beaumanoir, c. 18, Sec. 24; II Pollock and Maitland's *History English Law*, p. 398.

The law did not give the marriage any retroactive effect, by reason of this custom of throwing a mantle over the children born prior to wedlock, but the custom was recognized by the law, to the effect of legitimating the children, in the sense that the act of adopting the custom was equivalent to a legal adoption of the children, and in spreading the cloak over the children, the law was willing to also spread its protecting "mantle" over them and thus they became "mantle children," by force of both the law and this old custom of adoption. Although followed in Germany, France and Normandy, this custom was refused judicial recognition in the reign of Henry II. and Henry III. See Pollock and Maitland's *History English Law*, p. 398. But for illustrations of the application of the custom in the countries above named, see Schroder's "Mantel-Kinder" of Germany, D. R. G. 712.

Discussing the subject of "mantle-children," in his work "Wedding Day in All Ages," Wood says: "According to the Scotch law,

Neither the ancient Hebrews, Greeks, Mohammedans or Romans, regarded marriage as a religious ordinance, but the relation could be established, according to the laws and customs of all these ancient people, by the interchange of consent.³⁰

In Cnut's time, in England, we find that he made laws to prevent the sale of a woman to a man whom she disliked,³¹ but even at this stage of English society, the church approved these sale marriages and condoned the old betrothals of the Anglo-Saxons, and preserved the forms of ceremonies which still constitute the curious cabinet of antiquities of the English church.³²

The early Christian church, however, did not treat marriage as a sacrament; the doctrine that marriage was a sacrament was evolved from the Fifth Chapter of the Epistle of St. Paul, to the Ephesians and it was not until the Council of Trent, in the year 1563 that the Roman Catholic Church required the celebration of marriage to be accompanied by a religious ceremony.³³

the marriage of the father and mother legitimatizes all children previously born, however old they may be. An old saying is that 'all children under the mother's girdle or apron-string' at the time of the marriage, are legitimate. In very early days children born before wedlock used to perform a part in the marriage ceremony, by being placed under the veil or mantle of the bride or the pallium of the altar, in which position, they received the nuptial benediction. And instances have occurred in more modern times, where premature offspring have been put under their mother's apron, and had the string tied over them during her marriage." (Vol. II., pp. 74, 75.)

³⁰ Ringrose, "Marriage and Divorce Laws," p. 8.

³¹ Cnut, 74; II. Pollock and Maitland's History English Law, 365.

³² *Ante idem.*

³³ Ringrose, "Marriage and Divorce Laws," p. 9. We find from the second chapter of the Gospel of St. John that Jesus, himself, attended a marriage in Cana of Galilee, but performed no religious ceremony.

In England, as early as the seventh century, the concern of the church about all sins pertaining to the flesh, caused it to raise its voice upon questions concerning marriage and divorce.³⁴

By the middle of the twelfth century according to the laws of England, marriage was held to appertain to the spiritual forum.³⁵

In the memorable law suit of Richard de Anesty, in 1143, a marriage solemnly celebrated by the church, and from which a child had been born, was declared to be void in favor of a prior marriage, constituted by a mere exchange of consenting words, without the formality of a religious ceremony at all.³⁶

Soon after this decision, Glanville acknowledged the jurisdiction of the ecclesiastical courts upon all issues touching the validity of marriage and because of the acknowledged inability of the king's court to solve the issue, where the legitimacy of a litigant had been raised, the canon law was subsequently looked to in all such cases.³⁷

In 1215, at the Council of Lateran, Pope Innocent III. extended to the whole western portion of Christendom the custom of publishing "banns of marriage," calling upon all men to declare any just cause of impediment, if any could be urged to the union and from this time on,

³⁴ II. Pollock and Maitland's History English Law, 366.

³⁵ *Ante idem.* vol. I, p. 158; Letters of John of Salisbury, i, 124.

³⁶ *Ante idem.*

Under the Twelve Tables, enacted B. C. 449, a marriage, in Rome, could be contracted without any formality, by the consent of the parties alone. Bryce, "Marriage and Divorce," III. Essays in Anglo-American Legal History, p. 786.

³⁷ Glanville, vii, 13, 14; Select Civil Pleas, pl. 15, 92, 109.

marriages with banns, had certain legal advantages over a marriage without banns, but still the unblessed, formless marriage was a marriage, before the law.³⁸

During the reign of Henry II, Alexander III. decreed that a marriage by mere consent, in terms of a present, existing contract, would be given precedence over a later marriage by another man with the same woman, duly solemnized in religious form, and followed by physical union.³⁹ It seems a strong case, to give effect to the bare consent, in present form, "unhallowed and unconsummated" as against a solemn formal contract, followed by a consummated union, yet this decree was consistent with the ecclesiastical law, as interpreted from the middle of the twelfth century until the Council of Trent, and no religious ceremony or the presence of a priest was essential to constitute a valid marriage, before the catholic church.⁴⁰

In 1254 the interesting case of William de Cardunville, a tenant in chief of the Crown, came before the court, upon an *inquisitio post-mortem*, to determine which of two conflicting claimants was his rightful heir. He had solemnly espoused one Alice, with whom he had lived for sixteen years and had several children, the youngest being a son, four years old, named Richard. Long before his espousal of Alice, he had lived with and had a son by one Joan, and this son was also named Richard and was twenty-four years old at the death of his father. Joan established a common-law marriage, without the religious ceremony, and she was adjudged

³⁸ II. Pollock and Maitland's History English Law, p. 371.

³⁹ Compiliato Prima, lib. 4, tit. c. 6.

⁴⁰ II. Pollock and Maitland's History English Law, 372.

the rightful wife of the deceased and her son, the first begotten Richard, was awarded the livery.⁴¹

From an early date, the interpretation of the English Courts, as to the validity of a marriage based upon a present mutual consent of the parties, was followed in the United States, with the exception of Massachusetts, Maryland, West Virginia and Kentucky.

In the year 1810, Chief Justice Parsons, then on the bench of the Supreme Court of Massachusetts, rendered a decision, in which he denied that according to the common law a valid marriage could be made, by the mutual agreement of the parties alone.⁴²

Chancellor Kent, however, in 1809, as Chief Justice of the Supreme Court of New York, held that:

“No formal solemnization of marriage was requisite. A contract of marriage, made *per verba de praesenti*, amounts to an actual marriage and is as valid as if made *in facie ecclesiae*.”⁴³

This latter exposition of the common law of England has been generally followed in the United States, and may be said to obtain, generally, in all the states, other than those mentioned above, except where the local statutes provide otherwise.⁴⁴

Clearly, by the law of nature, marriage may be constituted by the mutual present consent of two competent persons, of the opposite sex, without other formality than the performed inclination of the individuals concerned and so the common, or unwritten law, recog-

⁴¹ *Calendarium Genealogicum*, i, 57.

⁴² *Atlantic Monthly*, for 1888, vol. 61, pp. 521, 527.

⁴³ *Ante idem*.

⁴⁴ *Atlantic Monthly*, for 1888, vol. 61, p. 521.

nized the legality of such a contract. The law of nature was adopted as the surest guide to the law of man, in this relation.

Considerable uncertainty and some confusion resulted in England as to the essentials of a valid marriage and the acts necessary to constitute a marriage, prior to the eighteenth century, but during the reign of George II, in 1753, a statute was passed,⁴⁵ requiring all marriages to be celebrated by a clergyman and in a church, unless by special dispensation by the Archbishop of Canterbury. This statute was repealed in 1836 when a purely civil marriage before only a Registrar, was permitted by the law of England, in lieu of the ecclesiastical ceremony.⁴⁶

Touching the issue as to the validity of a marriage not solemnized by religious ceremony, is the interesting and famous case of *The Queen vs. Millis*,⁴⁷ wherein the House of Lords, erroneously decided that such a marriage was void, according to the English law, in the year 1843.

The Irish Court of Kings Bench was equally di-

⁴⁵ 26 George II., c. 33.

⁴⁶ Bryce, "Marriage and Divorce," III. *Essays in Anglo-American Legal History*, p. 815.

The statute of the 26th year of George II., enacted that wedding banns should be regularly published three successive Sundays in the church of the parish where the parties were for the time residing. This statute was passed to prevent the evils of the "Fleet marriages," during the year 1616, when the Rector of St. James was suspended and clerical men living within the Rules of the Fleet, solicited passers-by for patronage and celebrated marriage ceremonies in ale-houses and garrets, without the publication of banns, or the existence of marriage licenses. Wood's "Wedding Day in All Ages," vol. II., page 235.

⁴⁷ 10 Clark and Finley, 534.

vided upon the issue and in the House of Lords, after the decision of the English judges had been given against the validity of the marriage at which no clergyman had been present, Lords Lyndhurst, Cottenham and Abinger were for holding the marriage void, while Lords Brougham, Denman and Campbell, were in favor of its validity, but on account of the precise form in which the question was put to the House, the effect of the division was to hold the marriage void, and thus a mere accident gave the decision in favor of the erroneous view that from the earliest time in English law, the presence of an ordained clergyman was essential to the celebration of a valid marriage, when, as we have seen, from the decisions and history of the law, this was not the case, either in England or according to the Roman law, until the Council of Trent.⁴⁸

But while both the temporal and spiritual courts recognized the validity of marriages based alone upon mutual consent, followed by a physical union, the religious ceremony in an early day, was held essential to endow the wife with the right to the husband's land. Bracton tells us that the endowment can only be made at the church door, for while the marriage may be contracted elsewhere, the bride can only be endowed at the door of the church.⁴⁹

This rule, however, was of course inconsistent with

⁴⁸ Pollock and Maitland, in their *History of English Law*, say that this erroneous decision may have pleased the Lords, but the opposite holding will be followed by historians of the middle ages. (Vol. II., p. 372.) And James Bryce, in his "Marriage and Divorce," III. *Essays in Anglo-American Legal History*, says that this "seems to have been an erroneous" decision. (Vol. III., p. 815.)

⁴⁹ Bracton, f. 92, 304, 305; Note Book, pl. 891, 1669.

the recognition of the validity of the marriage and both the ecclesiastic and temporal courts went to the extreme limit to legitimize the offspring of marriages, not the result of a wilful criminal relation. Retroactive and putative marriages were recognized, both in the temporal and ecclesiastical courts, when the legitimacy of children depended upon such a construction and in cases where the parents had married within the prohibited degrees of consanguinity, or if a woman, in good faith, married a man already married and believed that he was single and had children by him, the children would be held legitimate and capable of inheriting, under the law.⁵⁰

The courts, in order to legitimize the offspring of doubtful marriages, went the full limit, in upholding the marriage relation from a very early day, but the consort who abandoned her husband to dwell with her adulterer, was written beyond the pale of the law. By an old statute, of the reign of Edward I, a woman who eloped and abode with her adulterer was punished by a loss of dower⁵¹ and this statute was enforced, in the case of William and Margaret Paynel, which originated in 1302.⁵²

These parties petitioned the king for dower that was due the woman, as the widow of her first husband, John de Camoys. It was charged that Margaret had eloped with William and committed adultery with him. In answer, William and Margaret produced a solemn charter, whereby her first husband had "given, granted, re-

⁵⁰ Bracton, f. 63; Bliss, *Calendar of Papal Registers*, i, 254; *Year Book*, 11-12 Edward III, p. 481.

⁵¹ *Statute West*, II., c. 34; *Second Inst.* 433.

⁵² II. Pollock and Maitland's *History English Law*, p. 395.

leased and quit-claimed'' the said Margaret to William. They also introduced evidence to the effect that after they went to live together they had been charged with adultery in the court Christian, and that by the oath of compurgators, among whom were married and unmarried ladies and a prioress, they had successfully met this charge and they offered to leave to the decision of a jury the issue whether or not they were guilty of adultery in living together. The court, however, in a lengthy decree, held that the facts on their face constituted adultery and since no reconciliation of the first husband was shown, the woman was not entitled to dower, under this statute.⁵³

This illustrates the easy morality of the olden times, so contrary to our present standards, touching the marital relation, yet this case is not a parallel to many which could be cited in the golden days of Greece and Rome. So little sanctity was attached to the marital relation in Greece, even in the days of Pericles, that men were accustomed to loan their wives to their friends and the literature of the period made poetry of marital infidelity and fornication and adultery seemed about the commonest employment of both individuals and gods and goddesses. The Romans had more of the religious tendencies than the Greeks, but it is said that the Younger Cato loaned his wife, Marcia, to the orator Hortensius and took her back again, after his death.⁵⁴

⁵³ Rot. Parl. 2, 440, A. D. 1302.

⁵⁴ Ringrose, "Marriage and Divorce Laws," p. 9.

If the investigation of Edward J. Wood, in his book, "Wedding Day in All Ages and Countries," is accurate, the Eimauk, of Caubul,

Such conduct seems almost unbelievable, because so contrary to the natural moral instincts, yet the natural selection between two adults of the opposite sexes, although in derogation of the rights of the life-partner of either, seems hardly so depraved as the consent by the natural parents, to the marriage of infants of tender years, which custom was so prevalent in England and France in the past centuries.

During the middle ages, in England, the marriages of little children were frequently arranged by their parents, for the purpose of avoiding wardship and to prevent the children from forming improper attachments, or to effect advantageous family connections for the parents.

History records that Thomas, Lord Berkeley, was contracted to Margaret, daughter of Gerald Warren, Lord Lisle, in the forty-first year of Edward III, when the girl was only seven years old, and because of her tender years, it was stipulated that she should remain with her father for four years, but on account of sickness in the family, they were married when she was eight years old.⁵⁵

Maurice, fourth Lord Berkeley, was knighted at seven years of age, to prevent his wardship, and he was

"lend their wives to their guests"; "the Candyans, of the lower and middle classes universally practice polygamy and also lend their wives to their guests"; "the Kelaz, of the Paropamisan mountains of India, lend their wives, as do also the people of Kamul"; the "Mpongmes, an African tribe, lend their wives," and "the Koryaks, who are polyandrous, and the Chukchi, in the north-east of Siberia, lend out their wives, as do also the Aimaks."

II. "The Wedding Day in All Ages and Countries," pp. 97, 146, 151, 167, 237.

⁵⁵ Wood's "Wedding Day in All Ages and Countries," vol. II, p. 116.

married at the age of eight, to Elizabeth, daughter of Lord Spencer, when the bride was also but eight years old.⁵⁶

Hundreds of similar cases could be mentioned in France and England, and in tropical countries, where the women develop at an earlier age, the marriages occur at a corresponding earlier age. In Brazil, in the past century parents married their children when still in years of infancy and the case of a Brazilian traveler, enroute to England, who demanded a half-fare ticket for his wife, who was under twelve years of age, occurred in the year 1853.⁵⁷

We are also told that the Hungarians of the seventeenth century often betrothed their children while still in their cradles, and the marriages were celebrated at the earliest possible age.⁵⁸

The law, which can never rise superior to the prevalent sense of right in a given community, recognized the validity of these child marriages, in these several countries, just as it validated the "sale marriages" of the old Saxon days⁵⁹ and in early feudal times recognized

⁵⁶ *Ante idem*, p. 116.

⁵⁷ Wood's "Wedding Day in All Ages and Countries," vol. I, p. 179.

⁵⁸ Wood's "Wedding Day in All Ages and Countries," vol. I, p. 221.

⁵⁹ II. Pollock and Maitland's History English Law, p. 364; Tacitus Germania c. 18. The old Babylonians and Assyrians held a regular market day at a public place, for the sale of their daughters. (Wood's "Wedding Day in All Ages and Countries," vol. I, p. 70.)

The custom of purchasing wives was known to the ancient Greeks and was strongly opposed by Aristotle. The payment of money was frequently the only form of marriage, in ancient Greece. (Wood's "Wedding Day in All Ages and Countries," vol. I, pp. 33, 47, 51.)

In Syria every man paid a sum for his wife, proportionate to the rank of her father. (*Ante. idem.* p. 72.)

The Arabians bought their wives as they did their slaves. (*Ante. idem*, p. 82.)

the validity of exactions known as "Maiden-rent," a sum paid to the Lord of the Manor, in the nature of a fine, in consideration of his relinquishment of his accustomed right of spending the first night with the bride of his tenant.⁶⁰

As the relics of a barbarous age, such licentious customs, like the evidences of genius and depravity frequently found co-existent in the same individual, are in-

Burckhardt says that among the Bedouins, of Mount Sinai, marriage is a mere matter of purchase and sale. (*Ante. idem*, p. 85.)

And the same custom obtained among the Mohammedans, Javanese, Ethiopians, Circassians, Ostiaks, a Tarter tribe, Laplanders, the ancient Germans, Romans and French, as well as our early Saxon ancestors. (Wood's "Wedding Day in All Ages and Countries," vol. I, pp. 90, 155, 174, 210, 214, and vol. II, pp. 3, 173, 247.)

The custom of purchasing wives is perhaps derived from the old Salic law. It was known to the ancient Jews, as well as the other nations above mentioned and the custom of marriage portions and doweries is no doubt the outgrowth of this old practice. (Wood's "Wedding Day in All Ages and Countries," vol. II, p. 173.)

* Bouvier; Cowel; I. Reeves History English Law, pp. 369, 371. In legal contemplation, a female was in the custody of the Lord paramount, until she reached her majority, and then he was bound to find her a proper marriage. His custody continued until her marriage, even after she became of age and she could only marry with his consent. She was bound to obtain the consent of the Lord, or lose her dower, but it was sufficient, if she had the consent of the chief lord, to marry. The custom was based upon the fealty which the husband owed the lord and since the woman lost her inheritance, if she gave cause of forfeiture, the lord had it in his power to exact anything of her, and hence the custom referred to in the text, an exaction allowed by way of a punishment for the offense of belonging to the frail sex, in an early day. Reeve's History English Law, vol. I, pp. 370, 371.

Shakespeare makes Cade refer to this old barbarous custom, in 2' Henry VI., when he says: "* * * There shall not a maid be married, but she shall pay to me her maidenhead, ere they have it." (Act IV, Scene VII; White's "Law in Shakespeare," Sec. 299, p. 326).

teresting from a historical standpoint, as existing facts connected with the given institutions of a past age and also because many of the ancient customs, in altered form, furnish the basis for the later customs and practices, gradually changed, with the passing years, to meet the different conditions and institutions of later periods.

The custom of giving a dowry, or marriage portion, which has obtained from an ancient period, is no doubt the result of the old practice of paying for the wife in money, the presents, land, or sums paid by way of settlement being a mere modification of the old sale and purchase of the bride by the husband.⁶¹

In patriarchial days, we find Shechem, the son of Hamer, negotiating with old Jacob and his sons, for the marriage of Dinah and he said unto them: "Ask me never so much dowry and gift and I will give according as ye shall say unto me; but give me the damsel to wife."⁶²

The *donatio propter nuptias*,⁶³ of the Romans, and the old marriage dowry, the source of so much legislation and litigation in ancient England, France and other continental countries, is traceable, directly or indirectly to this old practice. Indeed, the oldest known laws treat of the marriage dowry, as we find that the code of Hammurabi, written 2250 years before Christ provided for the return of the dowry, in case of the divorce-ment of a barren wife.⁶⁴

⁶¹ Wood's "Wedding Day in All Ages and Countries," vol. II, p. 16.

⁶² Genesis, XXXIV., 12.

⁶³ Smith's Dict. Greek and Roman Antiquities.

⁶⁴ In the first known code of laws ever written, so far as our history goes, in the old code of Hammurabi, King of Babylon, who

Money was given the bride, from an early day in France, and we find that when Clovis married the Princess Clotilde, he sent, by proxy, a sou and a denier, which became by law, the usual marriage offering, in that country.⁶⁵ Caesar speaks of the marriage settlement, as a custom he found to exist amount the ancient Gauls;⁶⁶ it obtained among the Hebrews, at an early date⁶⁷ and has come to be a part of the marriage laws of most of the civilized countries.⁶⁸

Under the old Angle-Saxon law, dower could be assigned only at the church door.⁶⁹ Speaking on this subject, Littleton says:

“When he cometh to the church door to be married there, after affiance and troth plighted, he endoweth the woman of his whole land, or of the half, of other lesser part thereof, and there openly doth declare the quantity and the certainty of the land she shall have for her dower.”⁷⁰

Accordingly, we find, when Edward I. married Marguerite of France, in 1299, he endowed her at the door of Canterbury Cathedral, in order that the gift could be

reigned from 2285 to 2242, B. C., we find that doweries and marriage portions were spoken of, just as in modern statutes, and it was provided that if a childless woman should be returned to her father, he should return the dowry, and if he did not the husband could deduct all the dowry from the marriage portion and then return the marriage portion, the house of her father.

Code Hammurabi, Secs. 163, 164; Johns' "Oldest Code of Laws," pp. 32, 33; Johns' "Babylonian and Assyrian Laws," etc.

⁶⁵ Wood's "Wedding Day in All Ages and Countries," vol. II, p. 17.

⁶⁶ *Ante idem.*, p. 18.

⁶⁷ Genesis, XXXIV, 12.

⁶⁸ Ringrose "Marriage and Divorce Laws of the World."

⁶⁹ Selden.

⁷⁰ Coke, Littleton, 31.

witnessed by all the persons who had assembled to see the marriage ceremony.⁷¹

Seldon says that the use of marriage rings, grew out of the old custom of giving the bride a dowry, the ring being given as a symbol of the husband's good will, in lieu of the dowry money, of previous days.⁷²

However this may be, the custom of giving wedding rings to the bride dates from an early period. We find that Isaac propitiated the favor of Rebekah by presenting her with a massive ear-ring and two bracelets.⁷³ The betrothal ring was used in ancient Rome, and the Christian church no doubt adopted the wedding ring, from the pagan custom of the Italians, as a convenient sign of marriage.⁷⁴

In the ninth century the ring was used by the Romans for betrothal purposes and not as an insignia of mar-

⁷¹ Wood's "Wedding Day in All Ages," vol. II, p. 16.

Shakespeare makes frequent reference to the marriage custom of giving a dowry to the bride, in his various plays. Thus, in "Love's Labour's Lost," (Act II, Scene I), Boyet, in speaking to the Princess, refers to Aquitaine as "a dowry for a queen;" King John tells Phillip of France, that if his son shall love his daughter, "Her dowry shall weigh equal with a queen." (King John, Act II, Scene I.) Petruchio tells Katherine, in "Taming of the Shrew": "*Pet.* Your father hath consented that you shall be my wife; your dowry 'greed on; and will you, nil you, I will marry you." (Act II, Scene I.) Gloster, in 1' Henry VI., speaking of the proffer of his daughter to the King, by the Earl of Armagnac, refers to the "large and sumptuous dowry." (Act V., Scene I.) And the poor Lear, is made to ask the duke of Burgundy, in discarding his daughter, Cordelia: "What, in the least, will you require in present dower with her?" (Act I, Scene I.)

White's "Law in Shakespeare," Sec. 66, pp. 95, 97.

⁷² Wood's "Wedding Day in All Ages," vol. I, p. 25.

⁷³ Genesis, XXIV, 22, 53.

⁷⁴ Wood's "Wedding Day in All Ages," vol. II, p. 131.

riage;⁷⁵ it was used by the Anglo-Saxons, on the betrothal of their infant children, the ring being placed on the right hand, until the marriage, when it was transferred to the left,⁷⁶ and thus grew the custom, until finally, it became a part of the English law, that a wedding ring should be used at all church marriages.⁷⁷ This custom is still retained by the Catholics, among whom the ring is consecrated by the priest, sprinkled with holy water, in the form of a cross and then returned to the bridegroom.⁷⁸

The superstitions of olden times, which attached to the marriage ceremony, as celebrated in the early days of "little knowledge," as some writers refer to the antique periods of the human race, are also responsible for the present custom of throwing rice, old shoes, stockings, bouquets, and such like practices, at marriages.

The custom of throwing rice was no doubt borrowed from the ancient Persians, as rice was no inconsiderable portion of the marriage ceremony in Persia.⁷⁹ Rice was

⁷⁵ *Ante idem.* 130.

⁷⁶ *Ante idem.* 133.

⁷⁷ During the reign of George I. and George II., the wedding ring was placed on the usual finger at marriage and then transferred to the thumb. Wood's "Wedding Day in All Ages," vol. II, p. 134.

⁷⁸ *Ante idem.* p. 135.

⁷⁹ Wood's "Wedding Day in All Ages," vol. I, p. 94.

The Quakers and Mormons reject the wedding ring, because of its heathenish origin. Wood's "Wedding Day in All Ages," vol. II, p. 135.

The wedding rings of St. Louis, of France; of Margaret, daughter of the Earl of Warwick; of the wife of Duke John, of Sweden; of Martin Luther and Catherine Von Bora, his wife; the ring given by Henry VIII. to Anne of Cleves; that given by Phillip, to Queen Mary, and by Lord Darnley, to Mary, Queen of Scots, are described in Wood's "Wedding Day in All Ages," vol. II., pp. 145, 149.

considered an emblem of fruitfulness and the contracting parties, after their betrothal, met at midnight, on a bed, in the presence of two sponsors. The sponsor for the man, touched the woman's forehead and asked her if she would have the man; the same ceremony was gone through with by the sponsor for the woman and the hands of the contracting parties were then joined and rice was scattered over them and prayers for their fruitfulness were offered.⁸⁰

Rice also constitutes an important part in the marriages of the Hindus, the Brahmins, Javanese, the inhabitants of Elba and is quite generally used, in other European countries.⁸¹

The custom of throwing a shoe after the bridal couple, so generally followed, in England, Scotland and the United States, as a token of good luck, is directly traceable to the old Jewish law, making the shoe a sign of renunciation of dominion or authority, as well as a symbol of exchange.

Thus, under the Mosaic law, the brother of a childless man was bound to marry his widow and until he re-

Chaucer's reference to the wedding ring, in his "Troilus and Cressida"; Shakespeare's mention of the gemmal ring, in "Midsummer's Night's Dream"; and his use of the ring in "Two Gentlemen of Verona," "Twelfth Night" and "Merchant of Venice," with many traditions of the wedding ring, will be found interestingly presented in Wood's "Wedding Day in All Ages," vol. II., pp. 129, 149.

The custom of placing the ring upon the fourth finger of the left hand, according to the opinion of a writer in the British Apollo, in 1708, dates from the discovery of the convenience of the left hand for such ornament because less employed than the right and the fourth finger, less than others, was needed in ordinary use. See Knowlton's "Origin of Wedding Superstitions;" Finck's "Primitive Love and Love Stories."

⁸⁰ Wood's "Wedding Day in All Ages," vol. I, pp. 94, 95.

⁸¹ *Ante idem.*, vol. I, pp. 128, 133, 156; vol. II., pp. 44, 224.

nounced his right, she could not marry another. If refused, the woman was obliged to "loose his shoe from off his foot" and "spit before his face," as an assertion of her complete independence.⁸² The custom was followed, according to Bible evidence, in the espousal between Ruth and Boaz, for "as it was the custom in Israel concerning changing, that a man plucked off his shoe and delivered it to his neighbor," so the kinsman of this famous woman plucked off his shoe and gave it to Boaz, as a token of his renunciation of Ruth and of Boaz's right to marry her.⁸³

That this custom was later used by the early Christians, would seem to be confirmed by the story connected with the proposal of the Emperor Vladimir to the daughter of Raguald, for when asked if she would not marry the Emperor, she replied: "I will not take off my shoe to the son of a slave."⁸⁴ And as a part of the betrothal, in the early Anglo-Saxon days, we read that when the marriage was completed, the father of the bride took off her shoe and handed it to the bridegroom, who touched her on the head with it, as a token of the exchange and of his power over her.⁸⁵

Stocking throwing, at weddings, in England, has existed from a very early day and is said to be purely a British custom.⁸⁶

⁸² Deuteronomy, XXV, 5, 10.

⁸³ Ruth, IV., 7, 8.

⁸⁴ Boston Trans. Aug. 13, 1910; Wood's "Wedding Day in All Ages," vol. I., p. 16; Hutchinson's "Marriage Customs in Many Lands."

⁸⁵ *Ante idem.*

Wood quotes Michelet, in his "Life of Luther," to show that the great Reformer used the shoe at a marriage ceremony. Wood's "Wedding Day in All Ages," vol. I, p. 16.

⁸⁶ Wood's "Wedding Day in All Ages," vol. II., p. 218.

A letter describing the marriage, at court, of Sir Philip Herbert, in 1604, says that "at night there was sewing into the sheet, casting off the bride's left hose, with many other pretty sorceries."⁸⁷

In Fletcher's Poems, written in 1656, is a verse descriptive of Clarinda's wedding, referring to this old custom:

"This clutter o'er, Clarinda lay,
Half-bedded, like the peeping day
Behind Olympus' cap;
Whiles at her head each twitt'ring girle
The fatal stocking quick did whirle
To know the lucky hap."

It is reported that this custom, as well as that of putting the bride to bed, was followed at the wedding of Mary, Queen of Scots, to Lord Darnley; that the same ceremony was gone through with, at the wedding of Mary II. and the sedate Prince of Orange and that this custom was followed at nearly all the marriages of the crowned heads during the middle ages, in England, until George III. set aside the joyful custom of "posset-drinking and stocking throwing," on his wedding night.⁸⁸

The common law liability of the community property of the wife and her husband for the ante-nuptial debts of his wife, gave rise to a peculiar custom, in England,

⁸⁷ *Ante idem.*, p. 216.

⁸⁸ *Ante idem.*, pp. 215, 221.

Referring to the custom of stocking-throwing, Rowe, in his "Happy Village," in 1796 says:

"The wedding-cake now through the ring was led,
The stocking thrown across the nuptial bed."

And in the "Collier's Wedding," we read:

"The stocking's thrown, the company gone,
And Tom and Jenny both alone."

known as "Smock-marriages," or "Marriage in a Shift." This custom obtained from early Saxon days into the eighteenth century and the debtor bride often came to the wedding arrayed only in a plain white "smock" or "shift," as a public declaration or warning to her creditors that she took no property to her husband, as a basis for charging him with responsibility for her debts.⁸⁹

This eccentric custom, known as "marriage in a smock," in England, under which a widow was married with nothing on but a "shift," or "smock," upon the theory that her second husband would thereby escape liability for the debts contracted by her former husband, was also followed in the Colonies.

This notion that a bride who lacked modesty, as well as money could throw off her debts with her dress, by going to church in her smock or under garment and thus let her creditors "shift" for themselves, finds many examples in the English cases during the seventeenth and eighteenth centuries.

On October 17, 1714, Anne Sellwood, of Chilters, All Saints, Wiltshire and John Bridmore, were united in the holy bonds of matrimony and against the record in the parish register occurs the memorandum: "The aforesaid Anne Sellwood was married in her shift, without any clothes or head-gear on."⁹⁰

In 1766 a Whitehaven bride also sought to attain the same end, by going to church, as became any decent

⁸⁹ See Article on "Ancient Marriage Customs," in *Uncle Remus' Home Magazine*, June, 1912.

⁹⁰ "Matrimonial Curiosities," *Chambers Journal*, vol. 48, pt. 2, p. 813.

woman, undressing herself to her sole under-garment for the ceremony and donning her clothes again as soon as the knot was tied.⁹¹ And it is recorded that somewhere between the years 1838 and 1844, a Lincolnshire curate officiated at a wedding where the bride stood before him, enveloped only in a sheet.⁹²

While such attempts evidence a perhaps dishonest effort to evade the law of debtor and creditor, these "smock-marriages" nevertheless evince a most laudable inclination on the part of such bold brides to save the purse of their intended husbands, so while modern husbands would not appreciate the entire return to this now obsolete custom, they would not object to the effort of brides, while decently clad, in emulation of the spirit evinced by these ancient dames of the "shift marriage" period, of using their best efforts to spare the pocket-books of the men of their choice.

Alice Morse Earle, in her interesting volume, "Customs in old New England," refers to a "smock-marriage" at Westerly, Rhode Island.⁹³

The traveler Kalm also describes such a marriage in Pennsylvania, in 1748, where the bridegroom, with the proper spirit of chivalry, in order to save the appearance of his bride and also his credit, met the bride in her scant drapery, half way between her house and his own, well provided with warm garments which he dressed her in, after formally announcing, in the presence of the assembled guests, that the wedding clothes which he placed upon her belonged to him and were only loaned to the bride, especially for the occasion.

⁹¹ *Ante idem.*

⁹² *Ante idem.*

⁹³ "Courtship and Marriage Customs," p. 79.

John Gatchell married Sarah Cloutman, while she was clad only in her "shift," or "smock," in Lincoln County, Maine, in 1767,⁹⁴ and in accordance with the popular opinion that the creditors of the bride's first husband could not follow her farther than the king's highway, if she was married only in her "shift," many "smock-marriages" occurred at York, Maine, as recorded in the early history of Wells and Kennebunkport. The wedding of the Widow Mary Bradley occurred while she was clad only in her "shift," or under-garment, during the cold weather in the month of February, 1774; she went to meet the bridegroom, thus thinly clad and the minister found her with chattering teeth and shivering from the cold. Her groom had not been as thoughtful as the Pennsylvania bridegroom, in loaning her clothing for the occasion, so the gallant gentleman of the cloth kindly threw his cloak around the freezing bride, to protect her from the wintry blasts.⁹⁵

In Hall's "History of Eastern Vermont," there is a graphic account of the marriage of the Widow Lovejoy to Asa Averill. The widow was not even clad in her "shift," or under-garment, but appeared at the ceremony, in a nude condition, hidden behind a curtain, in a recess of the chimney.

Mr. William C. Prime, in his interesting book, "Along New England Roads," gives an account of two such marriages that came under his observation. He describes how the widow Hannah Ward, of Newfane, Vermont, was married to Major Moses Joy, in 1789, while

⁹⁴ Earle's "Customs in Old New England," p. 79.

⁹⁵ History, Wells and Kennebunkport.

the bride, perfectly nude, stood in a closet. She held her hand out of a diamond shaped hole in the closet door to Joy, and the ceremony was thus performed, in the absence even of "smock or shift."⁹⁶ Immediately after the ceremony, however, she appeared resplendent in her wedding garments, which the gallant Major had provided for her, in the closet.

In the other marriage, according to this old custom, as described by Mr. Prime, the nude bride left her room by a window, at night and standing on the top rung of a high ladder, she donned her wedding garments and thus abandoned the old obligations of her widowhood.⁹⁷

One of the most curious variations of this custom, however, is the account given, by Gustavus Vassa, of a "smock-marriage" which occurred on the gallows, in New York, in 1784. A felon who had been sentenced to death was about to be hanged, when he was liberated to wed a woman clad only in her "shift."⁹⁸ —

This strange belief in gallows matches, that a condemned felon could be thus rescued, by marriage to any woman who would take him from the gallows, is placed by Barrington in the list of legal vulgar errors. But, as suggested by a writer in *Chambers Journal*, under the subject "Matrimonial Curiosities," it seems doubtful if such a queer idea could have taken possession of the popular mind, unless there was some foundation for it, in the law.⁹⁹ It is perhaps but one of many

⁹⁶ "Along New England Roads," p. 25.

⁹⁷ "Customs in Old New England," p. 78.

⁹⁸ Earle's "Customs in Old New England," p. 79.

⁹⁹ *Chambers Journal*, vol. 48, pt. 2, July-Dec., 1871, p. 812.

Discussing the subject of "gallows-matches," Wood, in his "Wedding Day in All Ages," says: "Formerly was current a vulgar notion

such customs, arising from some isolated case, wherein the Court recognized it, which gave it currency and caused it to be followed in other instances.

We are told that in 1725 a woman petitioned King George I, for the pardon of a convicted felon, in order that she might wed him, under Tyburn Tree.¹⁰⁰

Manningham states that this was the custom, not the law, in olden times, in France, and Italy, and that if any notorious strumpet would beg a convicted felon, about to be hanged for her husband, her plea would be granted, in order that their joint lives might be bettered by so holy an action.¹⁰¹

Sterill reports a case that he had seen wherein a woman, clad only in her smock, or under-garment, begged a condemned person for her husband, with a white wand in her hand.¹⁰²

Whatever recognition the law gave this custom, that it actually existed in England, and France is evidenced by the many references to the practice, in story and rhyme, published during the seventeenth and eighteenth centuries.

Montaigne tells a story of a Picardian, who, seeing a lame dame advancing toward him, cried out: "She limps, she limps, despatch me quickly."¹⁰³ The ballads of Roxburghe also tell, in rhyme, how a merchant of

that if a woman married a condemned man under the gallows, she would thereby save him from execution. Certainly this exemption had a quasi-legal existence in France in the fifteenth century, as there are instances of it in the annals of that country." (Vol. 2, p. 25.)

¹⁰⁰ Chambers Journal, vol. 48, pt. 2, 812.

¹⁰¹ *Ante idem.*

¹⁰² *Ante idem.*

¹⁰³ *Ante idem.*

Chichester, who had killed a German, after his sentence and last speech upon the gallows, was wooed by no less than ten goodly maidens, who thus addressed him:

“This is our law,” quoth they;
“We may your death remove,
If you, in lieu of our good-will,
Will grant to us your love.”¹⁰⁴

But having left the fixed doctrines of the law governing the relation between the opposite sexes, known as marriage, to enter into a study and analysis of the vulgar errors in connection with this subject-matter, it is high time to bring the chapter to a close.

Of course it was only attempted in this chapter to take a most cursory view of the great subject selected and to present but a few of the many laws and customs that have sprung up among the various peoples of the earth, governing the relation whereby the opposite sexes, in accordance with the law of natural selection, appropriate themselves to one another.

In the ultimate days, when human multiplication has done its work—when man has become so populous that every square foot of ground upon the known earth shall be covered by a man—the law of evolution will no doubt have eradicated many of the present marriage laws and customs, based upon a false public opinion and the generation of the species will no doubt be conducted along more advanced and scientific lines.

For the next few centuries, however, judging the future by the past, the marriage relation will continue in the same crude and unscientific condition that has controlled it for the past five thousand years, so we need

¹⁰⁴ Roxburghe Ballads.

not now concern ourselves about any "devastating torrent" of children, but leave this vexed problem for succeeding centuries.

In the meantime, like visionary things, mere motes, the atoms known as human beings, will continue to be brought into the world, as a result of the unnatural laws and customs governing this natural relation,

"Still wondering how the marvel came, because two
coupling mammals chose,
To slake the thirst of fleshy love."

Tossed into the "giant grasp of Life, like gale-borne dust, or wind-wrung spray," the son of man will continue to be "the toy, the sport, the waif and stray of passions, error, wrath and fear."

Empires have perished and nations have risen during the period covered by the foregoing pages. Countless millions of human beings have lived their little lives, with their tincture of lust; tasted, for a brief space, the "joy in an armful of beautiful dust," as a result of the relation established by the laws and customs treated of in these pages, and then "step by step, perforce, returned" to "couthless youth, wan, white and cold, Lispering again the broken words, till all the tale be fully told." And thus, for successive ages to come, will the "moving row of magic shadow shapes," continue to come and go "Round with the sun-illuminated-lantern held, in Midnight, by the Master of the Show."

CHAPTER II.

WITCHCRAFT AND SORCERY.

Witch, is taken from the Hebrew word, rendered *venefica*, meaning a poisoner and divineress; one who dabbles in spells and fortune-telling.¹ In course of time, the term was used to indicate those who held communion with evil spirits and derived a super-human power from them, whereby they could not only foretell the coming of future events, but bring about evil results upon the life, bodies, or possessions of individuals. This unnatural power was supposed to be acquired by a compact with the devil himself, by which the wizard or witch bargained his or her soul to the devil as a consideration for the power of enchantment.²

From the earliest times, men and women have tried to hold communion with superior beings and to pierce the secrets of the future.

In the oldest code of laws in the known world, promulgated by Hammurabi, King of Babylon, 2285 years before Christ, the first two sections of the code are levelled at the crime of witchcraft, and we find that it is there written, that:

“If a man weave a spell and put a ban upon a man, and has not justified himself, he that wove the spell upon him shall be put to death.”³

¹ II. Mackay's "Memoirs of Delusions," pp. 169, 170.

² *Ante idem.*

³ Johns' "Oldest Code of Laws," 1; Scheil's "Tome IV. Textes Elamites-Semitiques," etc., Johns' "Babylonian and Assyrian Laws, Contracts and Letters."

And the same code provided that the man against whom the spell was woven, should plunge into the "holy river" and if the river overcame him, his house should go to the weaver of the spell, but if the river made the man innocent, he should take the house of the sorcerer and he was to be put to death.⁴

According to the photogravure of the blocks of diorite, upon which these most antique laws were written, therefore, when King Hammurabi, received his law direct from the seated sun-god, Samas,—the judge of heaven and earth—the old delusion of witchcraft and sorcery obtained. So prevalent was the offense, according to the delusion then obtaining, that the very first sections of the code were directed at this crime, established to the satisfaction of the judges of that period, by the test of a plunge into the "holy river," in the absence of more direct proof of the existence of the offense which existed only in the imaginations of the superstitious inhabitants of that misty age.

During the time of Moses, we find that many imposters insulted the intelligence of the Supreme Being, by claiming to have received delegated powers from on high and hence Moses provided in his law that "Thou shalt not suffer a witch to live." The long persecution of persons convicted of witchcraft, by a misinterpretation of this text, was thus justified by this Biblical injunction and many conscientious men and women, in their inability to understand the science of common things, attributed appearances which they could not explain, to supernatural agencies and blindly believing in this Mosaic law, proceeded to violate the highest laws

⁴ *Ante idem.*

of God and man, in the fanaticism that a Divine injunction was being obeyed, in the punishment of those convicted of witchcraft and sorcery.⁵

The Twelve Tables of the early Romans contained penal provisions against one who should bewitch the fruits of the earth or conjure away his neighbors' corn, into his own field,⁶ and a century and a half after the adoption of the Twelve Tables, one hundred and seventy Roman women were tried and convicted of poisoning, under the pretense of charms and incantations, which led to new laws against such supposed practices.

As the Mosaic law against witchcraft was formerly interpreted, to mean the punishment by death of witches who did positive injury to ~~another~~ in his person or property, so the Roman laws were directed against those supposed to have done positive injury to a person, in his property or to have hurt him, physically.

In other words, the mere possession of magic art, in the old heathen world, was not, in itself a crime, for while it was dreaded, as being liable to be turned to malicious or wrongful purposes, it was also recognized as a most beneficial art, through which the religion of domestic life and the remedy of healing the sick, was supposed to come.

⁵ II. Mackay's "Memoirs of Delusions," p. 169; Exod. XXII. 18. As Mackay shows, the sublime hope of immortality, in the early days of "little knowledge" became the source of a whole train of superstitions, from which fount a deluge of blood and horror poured over Europe, for two and a half centuries. "Memoirs of Delusions," vol. II., p. 168.

⁶ Niebuhr's Lecture, Roman History (English Tr.), vol. I., pp. 295, 319; George Long's article "Lex," in Smith's Dictionary of Greek and Roman Antiquities; Mommsen's History of Rome (English translation), vol. I., book I., ch. II. and book II., ch. 2.

That this view of witchcraft continued to prevail for many centuries after the reception of Christianity, is evidenced by the laws of Constantine, in the fourth century, which ordained capital punishment for all those who practiced noxious charms against the life or health of others, by supernatural power, but exempted from the punishment of the law, all those who practiced magical arts for beneficial purposes, such as warding off hailstorms, and excessive rains or windstorms, or curing cattle or persons afflicted with disease.⁷

The savage laws by the Christian Emperors in the

⁷ *Codex Justin. lib. ix, tit. 18.*

The "Dialogue on Witches and Witchcraft," published by the Percy Society from the literature of the middle ages, presents the reasons and basis for the belief in Witchcraft, "in which is layed open how craftily the divell deceiveth not onely the witches, but many other, and so leadeth them awrie into manie great errours, By George Giffard, Minister of God's word, in Malden, published in 1603."

In this Dialogue, Daniel quotes Christ's words, as reported by Marke, that his name is "Legion, for we are many," as evidence of the existence of "multitudes and armies of divels, as we see in the Gospel." The command of the Mosaic law "Thou shalt not suffer a witch to live," is quoted as a sufficient reason for rooting them out; the words of Moses are quoted that the Lord would cast out those nations that hearkened unto soothsayers and diviners, pronouncing that every one that does those things are an abomination to the Lord; that the Lord not only declared that such as practiced witchcraft and sorcery were an abomination before the Lord, but that they should "also bee rooted out." (Percy Society Pub. vol. VIII., 24, 40, 42, 52, 72.)

The belief that cats were bewitched to do the bidding of the devil, which formed such a large part of the delusion of witchcraft, as practiced in the middle ages, is also touched on, in the "Dialogue on Witches," in the above interesting publication, from the literature of the middle ages which can be read with much amusement and entertainment, because it gives in realistic hue, a vivid pen picture of the old delusion, just as it existed in the early days of the seventeenth century.

early centuries did considerable harm in after ages. The Anglo-Saxons patterned their laws against sorcery and witchcraft after the folk-laws of the continent and Cnut, even, legislated against the witchcraft which was heathenish.⁸

During the reign of Henry I, criminals who encompassed the maiming or sickening of a person by maltreating a waxen image of him—a belief that generally obtained from this time until the seventeenth century—were either hanged or burnt.⁹ And during the reign of this monarch, in England, Archbishop Gerard, of York, was accused of necromancy and sorcery and when it was discovered that he had died suddenly, and a book on the subject of astrology was found under his pillow, his body was refused burial in the Cathedral.¹⁰

After the influence of the Catholic religion had safely extended its power over the western world, however, and the fear of a return to paganism was looked upon as most improbable, the church was not inclined to look with such aversion upon the class of criminals accused of dabbling in the black arts. Astrology and necromancy were looked upon with considerable admiration by the most powerful of the church and laity and even Bishops and Popes tempted the powers of evil, by little harmless excursions into the great realm of the supernatural.

This temporizing by the church continued until about the beginning of the thirteenth century, when heresy

⁸ Cnut, II., 4; Lea. *op. cit.* iii. 420; Brunner D. R. G. ii. 678; II. Pollock and Maitland's History English Law, p. 553.

⁹ Leg. Hen. 71; II. Pollock and Maitland's History English Law, 553.

¹⁰ II. Pollock and Maitland's History English Law, p. 553.

had become so common that the interests of the church were threatened and when the church began, in various parts of the world, a most stringent prosecution of witches and sorcerers and the crowned-heads of Europe, in humble submission to the demands of the Pope, used the power of the kingdom in an attempt to rid the church of this threatened evil.¹¹

From an early day, in France, people were punished for supposed crimes resulting from witchcraft and sorcery. Charlemagne frequently ordered all necromancers, sorcerers and witches to be driven from the realm and with the gradual increase of the crimes attributed to them, he published different edicts, preserved at length in the "Capitulaire de Baluse."¹²

By these edicts, death was decreed against all those who practiced feats of sorcery and witchcraft, and those who conspired with the devil to afflict either man or woman, with barrenness; who excited tempests, or windstorms; destroyed the fruits of the earth, hurt cows, or other animals, and afflicted human beings with sores or disease, were to be immediately executed, upon their conviction.¹³

From the time of Charlemagne until the eighteenth century, in France, England, Scotland and other European countries, the trials for witchcraft and sorcery continuously multiplied and it became the common means to enable a wolfish monarch to rid himself of a disliked rival or subject, upon some trumped-up charge, based upon some trivial circumstance connected with an unexplained phenomenon.

¹¹ II. Pollock and Maitland's History English Law, p. 553.

¹² Garinet's "Histoire de la Magie en France."

¹³ *Ante idem.*

The destruction of the Stedinger, in 1234; the persecutions of the Templars, from 1307 to the year 1313; the trial and execution of poor Joan of Arc, in 1429, the tragedy of Arras, in 1459, and many other horrible casualties, during the middle ages illustrate the prevalency with which this delusion was used to bring about the death and destruction of a large portion of the human race, who were guilty only of living in an age of ignorance and cruelty.¹⁴

At the instance of Pope Gregory IX, the Emperor of Germany, Frederic II, pronounced his banns against the valliant Stedinger, in 1233 and a crusade was inaugurated against them in all Germany. Eight thousand of them were slain upon the field of battle and the whole race extinguished and their houses and woods were burned, because they would not embrace the Catholic religion, but continued to adhere to their own ideals and ideas in religion and government. The Pope charged that they "insulted the holy sacrement, consulted witches to raise evil spirits, shed blood like water, took the lives of priests and concocted an infernal scheme to propogate the worship of the devil."¹⁵

¹⁴ Dr. Sprenger, in his "Life of Mohammed," computes the entire number of persons who were burned as witches, during the *Christian epoch*, as about *nine million*.

Tasso attributed the belief in magic and witchcraft to the Crusaders, but M. Michaud, in his "History of the Crusades," denies that the Crusaders believed in witches. However, the edicts of Charlemagne demonstrate quite conclusively that Tasso was right, for the Crusaders, in common with the millions of their contemporaries who were votaries of the delusion of witchcraft and sorcery, attributed the misunderstood facts in the natural world about them, to supernatural powers of magic.

¹⁵ Mackay's "Memoirs of Delusions," vol. II., p. 186.

The Templars had also offended the Church and in 1307 the charge was brought against them that they were in communion with evil spirits and had sold their souls to the devil. This charge effected its object and they were extirpated, even as the poor Stedinger had been, in the previous century.

Philip IV, of France, acting under authority of the Pope, ordered the arrest and trial of the Templars and the confiscation of their goods and property. Hundreds were put to the rack and when tortured by pain, confessed the most unreasonable charges which were lodged against them and this only heightened the popular clamor and the persecution against them, as a body. Fifty-nine Templars were burned alive, by a slow fire, in a field adjoining the city of Paris, after they had been convicted of witchcraft and sorcery, and other instances of their persecutions, upon this charge, occurred in the different provinces, until the year 1313, when the Grand Master of the Order Jacques de Molay was burned to death, a fitting climax to this reign of terror, inaugurated by the Pope and Monarch, to rid themselves of an odious order—a lasting stigma to the memory of the Pope and Monarch responsible for such conditions and an ever increasing source of pity to the millions possessing the divine gift of a tender fellow-feeling for their own kind.

In 1429 the poor Joan of Arc fell a victim to the charge of witchcraft and sorcery and like dual criminals, proceeding hand in hand to accomplish the crime, religion and law, not only failed to raise a hand to prevent the conflagration that consumed and tortured the sainted body of this patriotic victim, but actually con-

summed the crime, in the name of holy order and legal procedure, which will remain eternally as one of the saddest and most pitiable spectacles of the weakness and criminal blunderings of the Church and State.

In 1459 a devoted congregation of the Waldenses, at Arras, fell victims to a charge of witchcraft and sorcery. Many of them, when placed upon the rack, admitted their guilt, to escape the torture; prominent rulers and people of wealth were involved and many were burned, while others were thrown in prison, or paid large fines to escape a worse fate, at the hands of the ignorant and intolerant courts, that reflected the hatred and persecution of the enraged populace.¹⁶

In 1487 two old women were arrested for witchcraft, in Switzerland, for having caused a tempest. They were placed upon the rack, where people, enforced to do speak anything, and after severe torture they admitted that they were in collusion with the devil and were condemned to die, and if the criminal register at Constance is to be believed, they were burned at the stake, for after the name of each, appears the significant epitaph: "*convicta et combusta.*"¹⁷

Speaking of the great prevalency of this accusation, about this period, Florimond, in his work concerning the Anti-Christ, observes:

"The seats destined for criminals in our courts of justice are blackened with persons accused of this guilt. There are not judges enough to try them. Our dungeons are gorged with them. No day passes that we do not render our tribunals bloody by the dooms which we pronounce, or in which we do not return to our homes,

¹⁶ Monstrelet's Chronicle.

¹⁷ II. Mackay's "Memoirs of Delusions," p. 194.

discountenanced and terrified at the horrible confessions we have heard.”

But the *Witch Mania* in Europe, may be said to properly date from about the year 1488, when Pope Innocent VIII, in a determined effort to rid the Church of Rome of the stigma and opposition of those supposed to be prompted by the devil, appointed inquisitors in every country, armed with the apostolic power to accuse and punish this class of criminals.¹⁸

Following the appointment of this commission and those of successive Popes, a wholesale slaughter of innocent men and women, followed this crusade of bigotry and ignorance.

Cumanus burned forty-one women in one province alone, in Italy; Sprenger burned more than five hundred in a year, in Germany; five hundred were burned in Geneva, in 1515 and 1516; in the district of Como, in the year 1524 about a thousand people suffered death for witchcraft and for several years thereafter the general average in this district was a hundred a year and one inquisitor alone, Remigius, took whatever credit he was entitled to, for having during a period of fifteen years convicted and burned nine hundred poor souls for this imaginary offense.¹⁹

In 1520 witches were burned in fires that were ever kept burning to receive their tortured bodies, in France. In 1561 five poor women of Verneuil were convicted of turning themselves into cats and prowling around and performing satanic feats, as a result of which they were all burned alive.²⁰

¹⁸ Mackay's "Memoirs of Delusions," vol. II., p. 195.

¹⁹ *Ante idem.*, p. 197; Danaeus, "Dialogues of Witches."

²⁰ Mackay's "Memoirs of Delusions," vol. II., p. 199.

In 1571 the celebrated sorcerer, Trais Echelles, after his confession, was burned at the Place de Greve, in Paris.

In 1573 Giles Garnier, of Lyons, was indicted for being a loup-garou, or man wolf,²¹ and prowling around at night and destroying children. Fifty witnesses testified against him and after being placed upon the rack, he confessed the crime he was charged with and was condemned by Dr. Camus to be:

“tied to a stake and burned alive and that his ashes be then scattered to the winds.”²²

The conditions in England, during the sixteenth century, were about the same as in France, Germany and Italy, so far as the persecutions for witchcraft were concerned. While rooting out many errors of ignorance and superstition, the Reformation made no head-way at all against witchcraft and sorcery, the greatest evil of the period and strange to narrate, while their followers were persecuted for this crime, Luther and Calvin were as firm believers in witchcraft as were the Popes whom they opposed and their followers were even as zealous persecutors of the innocents accused of this crime as were the churchmen of the old religion.²³

A few of the English cases will not be found uninteresting as illustrative of the prejudice and persecu-

²¹ The ignorant Canadian French still believe in the Loup-garou, just as the French did in the centuries gone by.

²² Mackay's "Memoirs of Delusions," vol. II., p. 201.

²³ Hutchinson, on Witchcraft.

In the year 1670 a number of women were condemned by the Parliament of Normandy, for riding broom-sticks to the Domdaniel. Louis XIV., commuted their sentences to banishment for life, when the Parliament of Rouen presented to him a memorial, insisting

tion levelled at those accused of witchcraft in that country, during the sixteenth and seventeenth centuries.

The celebrated case of the Witches of Warbois, in 1594, is especially worthy of mention. The good old Mother Samuel lived in the neighborhood of Sir Samuel Cromwell and a Mr. Throgmorton and the latter had several daughters and among them a Miss Joan, who was a melancholy girl, whose head was filled with stories of ghosts and witches and she conceived the idea that poor old Mother Samuel had bewitched her, as she felt sudden pains in her limbs and strange sensations, when she went near her. Her parents believed her and after a few family casualties the poor old woman was arrested upon a charge of witchcraft filed against her by the family of Sir Samuel Cromwell, after the death of his wife, as she had confessed, upon different persecutions that she had afflicted them with pains and fits and turned their milk sour in the pans, prevented their ewes and cows from bearing and that she had caused Lady Cromwell's death. She also confessed that her husband and daughter were leagued with her in witchcraft and all three were found guilty and hanged on April 7', 1593.

In Scotland, during the ninth Parliament of Queen Mary, witchcraft was made a crime punishable by death, and after this statute, the superstition and fear of the people brought frequent accusations against different people, many of whom were prominent in Government and social circles.

that he set aside the order for their commutation, but the wise King stood firm and refused to let them be judicially murdered in his kingdom. (For this memorial in full, see II. Mackay's "Memoirs of Delusions," pp. 289, 298.)

The case against Dr. Fian and his accomplices will illustrate the feeling obtaining in Scotland about this period. Gellie Duncan implicated Agnes Sampson and when she was put to the torture, she also implicated Dr. Fian, Marion Lincup and Euphemia Macalzean, the daughter of Lord Cliftonhall. They were charged with having attempted the king's life, through witchcraft and sorcery. It was charged that they had raised a fearful storm at sea, to attempt to wreck a ship on which the king, James VI., and his bride had sailed. Several of the accused were subjected to the torture and finally confessed to the crime and implicated the rest, and on June 25', 1591, Barbara Napier, Gellie Duncan, Agnes Sampson, Dr. Fian and twenty-five others were hanged for witchcraft and Euphemia Macalzean was "bound to a stake, and burned in ashes, *quick* to the death."²⁴

After this conviction in Scotland, the renown of King James as an enemy to witchcraft and sorcery, preceded him to England and when he ascended the English throne in 1603, he was ready for a new crusade against this obnoxious class of criminals.

The first statute upon witchcraft, in England, was that of 1541, which defined the offense and affixed the punishment.

Two statutes were passed in 1551, one relating to false prophesies, due no doubt to the machinations of Elizabeth Barton, the "Holy Maid of Kent," and the other was levelled at conjurgations, witchcraft and sorcery.

The statute of Elizabeth, in 1562, recognized witch-

²⁴ II. Mackay's "Memoirs of Delusions," p. 226.

craft as a crime of first magnitude, punishable by death, regardless of whether it was exerted against the lives, limbs, or property of the subjects.²⁵

On his accession to the throne in 1604 King James passed the statute whereby it was enacted that:

“If any person shall use, practice, or exercise, any conjuration of any wicked or evil spirit, or shall consult, covenant with, or feed any such spirit, the first offense to be imprisoned for a year and stand in the pillory once a quarter; the second offense to be death.”

The milder punishment was not inflicted, but all convicted under this statute were hanged and burned, or burned, without previous strangling, “alive and quick.”

This statute continued on the statute books until the year 1736, when it was repealed and suffered no longer to disgrace the intelligence of the country, after which date witches, conjurers and fortune-tellers were only subjected to the jail sentences common to other misdemeanors, confinement for short intervals, or the pillory.

We are reliably informed that during the Long Parliament, in England, three thousand witches were executed²⁶ and during the first eighty years of the seven-

²⁵ Very severe statutes were passed during the reign of Elizabeth, against the imaginary crime of witchcraft and sorcery. The statute 33 Henry VIII. c. 8, was repealed by 1. Edward VI., c. 12 and as this left no law in force to punish this class of offenders, it was enacted by 5 Elizabeth, c. 16, that if any person used or practiced witchcraft, enchantment, charm or sorcery, whereby any one shall happen to be killed or destroyed, it shall be felony, without clergy. And if any one thereby be wasted, consumed, or lamed, in body or member, or any of his goods destroyed or impaired, such offender shall be imprisoned for a year, and stand in the pillory once a quarter, during that time for six hours. (V. Reeve's History English Law, p. 349.)

²⁶ See “Butlers Hudibras,” edition by Dr. Zachary Gray (vol. II).

teenth century, it has been estimated that five hundred people were annually executed for witchcraft, in England, making a total of forty thousand who thus met their deaths, during the whole period referred to.²⁷

One of the rankest weeds in the garden of wild delusions that flourished in England, in the seventeenth century was Matthew Hopkins, who prided himself upon the title of "Witch-finder General." About 1644 he made the discovery of some moles or other marks on the accused persons, which he advertised as "devil's marks" and he immediately became in great demand in helping to hunt down and convict persons accused of this crime.

He had several tests to subject them to, and one of the cruelest was to tie the hands and feet of the prisoner together cross-wise, the right thumb to the toe of the left foot and *vice versa*. Being thus tied, so they could not swim, they were wrapped in a cloth or blanket and placed in a pool of water or a river, on their backs. If they sank, they were innocent, but drowned for their innocence, and if they floated, they were adjudged guilty of witchcraft and hanged or burned.²⁸

Another kind of punishment, to extort a confession, was what was called "Waking" the witch. An iron bridle or hoop was placed cross-wise of her face with four prongs, penetrating the mouth. The hoop was fastened to the wall at the back of the head, so that the prisoner could not lie down. She was kept in this position sometimes for several days, attendants constantly prodding her, to keep her awake.²⁹

²⁷ Mackay's "Memoirs of Delusions," vol. II., p. 237.

²⁸ Lecky's "Rationalism in Europe," vol. I.

²⁹ Lecky's "Rationalism in Europe," p. 146, vol. I.

In 1664 the venerable Sir Mathew Hale, condemned Amy Duny and Rose Cullender, to be burned at the stake in St. Edmondsbury, upon the most flimsy kind of proof, offered to establish this imaginary crime.³⁰

When these two old women went to a shop to purchase herring, their ugliness caused them to be insulted, and they resented it. The daughter of the owner of the store was afflicted with epilepsy and the women were charged with having bewitched her. She was blind-folded and when they touched her, her imagination and nervousness was such that she was thrown into a fit and this was received as proof positive of her bewitchment and the fact that she also was thrown into a fit, when similarly blind-folded, when others than the accused persons touched her, was held incompetent as evidence in their favor.

Upon the evidence of Samuel Pacey, the girl's father, Margaret Arnold, her aunt, and Thomas Brown, as an expert witness upon Witchcraft, the learned Sir Mathew Hale charged the jury to ascertain from the evidence, first, whether or not the persons charged were actually bewitched and if so, whether or not the prisoners had actually bewitched her. He personally told the jury that he had no doubt of the fact that witches existed, first because the Scriptures affirmed it and, secondly, because the laws of the country recognized it. The jury promptly returned a verdict of guilty and the girl and her father called the next morning to see Sir Mathew Hale and advised him that the complete recovery of the girl followed within a half hour after the verdict of conviction against the prisoners.³¹

³⁰ II. Mackay's "Memoirs of Delusions," p. 248.

³¹ II. Mackay's "Memoirs of Delusions," pp. 253, 254.

Eleven cases of witchcraft were tried before Chief-Justice Holt, between 1694 and 1701, but sentiment was changing toward this offense, by this time and this rugged and astute lawyer made such an appeal to the jury, in each case, that all the defendants were acquitted.³²

Jane Wenham, known as the "Witch of Walkerne," was tried and convicted before Lord Chief-Justice Powell, in 1711, upon the most fanciful and ridiculous kind of evidence, but she was pardoned, before her execution.³³

In 1716, however, a woman and her daughter only nine years old, were tried and convicted of sorcery, at Huntingdon, because they had washed their stockings and made a lather of soap and raised a storm and for this terrible offense they were both hanged.³⁴

³² *Ante idem.*

³³ II. Mackay's "Memoirs of Delusions," p. 255.

³⁴ II. Mackay's "Memoirs of Delusions," p. 258.

While this hideous record of blood and murder, in the name of the law, was being recorded in England, during the seventeenth century, a similar record was being written, in the criminal courts of Spain, Italy, Scotland and Germany. Thousands of innocent people lost their lives under this charge in these countries, during this century.

As an illustration of this mad carnival of death, in Würzburg, alone in the two years following 1627, one hundred and fifty-seven people were burned, in twenty-nine burnings, averaging from five to six people at a burning. The wealthy and the paupers, old and young, the ungainly and the comely, all alike suffered in this unholy crusade.

Of the list there were three play-actors; four innkeepers; three councilmen; fourteen vicars; the burgomaster's lady; an apothecary's wife and daughter, the wife, sons and daughter of the councillor Stolzenberg and Gobel Babelin, "the prettiest girl in the town," thirty-two vagrants and a large number of little innocent children, who were guilty of no offense or crime other than that of living in

But this was the last judicial execution for witchcraft in England, although many prisoners were charged with the crime, between this date and the year 1736, when the statute of James I. was repealed.³⁵

While the delirium of witchcraft was raging in Europe,—until its victims numbered tens of thousands and its votaries millions,—the fever spread across the ocean and the New England colonists also fell a prey to the superstition. The fear of witchcraft and sorcery seized the multitudes in the United States, in the middle of the seventeenth century and supposed criminals were arrested in such numbers that the prisons were not large enough to hold them.

The persecutions at Salem, Massachusetts, lasted from February until September, 1692, during which time, nineteen supposed witches were hung, fourteen of them being women.³⁶

Under the early statutes of New York and Pennsylvania, witchcraft was a capital offense.³⁷

The good William Penn, who fled from similar persecution in England, presided in the "City of Brotherly Love," at the trial of two Swedish women, who were arraigned for witchcraft. The funeral pile had been prepared and the flint and tinder were all ready to burn them, but fortunately they were acquitted of the charge.³⁸

a period when their innocence was considered a crime. (Hauber's *"Acta et Scripta Magica."*)

³⁵ II. Mackay's "Memoirs of Delusions," p. 258.

³⁶ Upham's "Salem Witchcraft, in Outline"; Nevin's "Witchcraft in Salem Village."

³⁷ Upham's "Witchcraft in Outline," p. 6.

³⁸ Upham's "Witchcraft in Outline," 6.

In Connecticut and Massachusetts, the penalty for witchcraft was death and the laws of these states were based not only upon the Mosaic code, but upon the Common Law of England, as well.

A few trials occurred in Virginia and Maryland and six persons were hung, in Connecticut, for witchcraft, during the last half of the seventeenth century.

Margaret Jones was executed for witchcraft, in Boston, in June, 1648; Mary Parsons, of Springfield, Massachusetts, was tried and convicted, in 1651; Mrs. Ann Hibbins was executed in Boston, in 1656, and Goody Glover was executed at the same place, in 1688.³⁹

The history of the persecutions at Salem, Massachusetts, has furnished the basis for several books, presenting the harrowing details of the trial of the several victims of the crusade against the delusion of witchcraft, at that place.⁴⁰

The Salem persecutions began with the delusions of a party of young girls, who imagined they were bewitched. Elizabeth Parris, aged nine, the daughter of Rev. Samuel Parris, her cousin, Abigail Williams, aged eleven, Ann Putnam, aged twelve, the daughter of the parish clerk, Mary Walcott, Mercy Lewis, Elizabeth Hubbard and several other girls furnished the evidence upon which these persecutions were begun.

After reading of witchcraft and magic, these children, who had worked themselves into a state of nervous excitement, began to cut queer antics, such as hiding in holes; crawling under chairs; assuming odd postures

³⁹ The trial of Mary Dyer, Quaker, is presented in "Two Letters of William Dyer," 1659-1660.

⁴⁰ Upham's "Salem Witchcraft"; Nevin's "Witchcraft in Salem"; Moore's "History of Witchcraft in Massachusetts."

and uttering loud and incoherent expressions, all of which they attributed to the supernatural power exerted over them by three women of the neighborhood, Sarah Good, Sarah Osburn and an Indian woman named Tituba. Acting under the license of witchcraft, these girls disturbed religious worship, at will and performed other little misdemeanors, which their doting parents laid to the door of the witches, instead of correcting them, as they should have done.

Finally the three women were arrested and arraigned for the crime of witchcraft. They were unpopular and uncomely women, as Mrs. Upham shows, Mrs. Good having been abandoned by her husband and Mrs. Osburn being a poor unhappy woman, bed-ridden and suffering from nervousness and melancholia.⁴¹ Tituba, the Indian woman, believed in witchcraft herself and had told the children stories of evil spirits until they firmly believed in her unnatural power.

On March 1', 1692, the trial was begun at the meeting house in Salem, before Esquires John Hathorn and Jonathan Corwin. Sarah Good was first examined and denied any communion with evil spirits and affirmed her service of God. No counsel was allowed the prisoners, as this was the custom according to the common law, in capital cases, unless the Court was in doubt, as the Judge was supposed to be the counsel for the prisoner.

After having been tormented for some time, and believing her escape to lie only in the conviction of someone else, Mrs. Good accused her co-prisoner, Mrs. Osburn, and she was remanded to jail and Mrs. Osburn

⁴¹ Upham's "Salem Witchcraft," pp. 25, 26.

was brought before the court. Frail in body and feeble in her intellect, this poor woman, when interrogated by the pompous oracles of the law, could only protest her innocence and deny any communion with evil spirits, or any knowledge of the offense charged against her by her alleged accomplice.

After this travesty of a trial, she was again committed to prison, where she was kept heavily chained, from March 7, until May 10', when she died, her innocent soul being thus forever released from the unnatural and inhuman affliction heaped upon her body by her fellow-beings. The Indian woman, when she was examined, did not deny that the children had been bewitched, but she laid it all to the door of her co-defendants, Mrs. Good and Mrs. Osburn.

The girls, when brought before the supposed witches, fell down and shrieked, in their excitement; if the prisoners clasped their hands, they screamed that they were pinched; when they bit their lips, they in turn, asserted that they were being bitten; they produced pins, which they said the witches had pricked them with and worked upon the morbid imagination of the assembly so that the trials of the witches were little less than a burlesque.⁴²

Martha Corey was arrested on the 19' of March, 1692, and the evidence of her husband was used against her, to the effect that she had taken his saddle to keep him from attending church; that she sat up late at night and frequently kneeled on the hearth, as if in prayer,

⁴² Upham's "Salem Witchcraft," pp. 44, 45; Nevin's "Witchcraft in Salem," 46, 69.

but uttered no word; that certain of his cattle had been afflicted and that one of their cats had had a fit. On such evidence as this, this good woman, was adjudged guilty and was one of the eight persons executed on the 22' of September.⁴³

On April 19', 1692, when he was over four score years of age, poor old Giles Corey was arrested for witchcraft, at Salem, and his case furnishes the only instance in the United States, where to avoid the attainder of his blood and the forfeiture of his estate, a prisoner obstinately stood mute and was "pressed to death."

His unfriendly course toward his wife and the attitude of two of his four sons-in-law in testifying against his wife, no doubt so worked upon his mind as to cause him to make a terrible expiation. He deeded all his property to his two favorite sons-in-law, William Cleeves and John Moulton, and decided to then stand mute and refuse to plead and let the law take its course.

Of course he knew that the gates of justice were closed to him and that he would be convicted, although he was innocent, but he determined to defy the multitude and to withhold his plea, in order to save his property for his sons-in-law and to show his courage, in the supreme test.

Longfellow, in his "New England Tragedies," has described this feeble old man, withstanding the exhortations of his friends, in his determination to die the death of a martyr in an unjust cause, and one cannot read the graphic and realistic account of this tragedy,

⁴³ Upham's "Witchcraft in Outline," 61.

without feelings of the greatest compassion and admiration for this grand old stoic, of our own soil, who bravely suffered his body to be pressed until all life was extinct and whose soul took its flight from the open field, near the Howard street burial ground, in the village of Salem, on September 19', 1692.⁴⁴

In the case of the gentle Rebecca Nurse, even after her acquittal, by a jury, regularly empaneled and charged to try her for witchcraft, the frenzied populace "recalled the decision" and she was sentenced by the Court, to meet the demands of the mob; she was carted to the summit of Gallows hill, and hanged, on July 19', and her case furnishes one of the most unjust instances of the "recall of a judicial decision" and one of the grossest travesties upon justice in the history of any country.⁴⁵

Because John and Elizabeth Proctor had absented themselves from the meetings, during the trials for witchcraft, they were finally accused and thrown in prison. He made a manly appeal for a trial at Boston, in a letter dated July 23', 1692, addressed to Mr. Mather, Mr. Allen, Mr. Moody, Mr. Willard and Mr. Bailey, but all to no avail. His friends petitioned the Court; one of the girls who testified against them made a statement that she "must have been out of her head," when

⁴⁴ *Ante idem.*, p. 69.

⁴⁵ Rose Terry Cooke, in her, "Death of Goody Nurse," thus describes the death of this good woman:

"They hanged this weary woman there,
Like any felon stout;
Her white hairs on the cruel rope
Were scattered all about."

she gave her evidence, as it was not true, but nothing could stem the tide of the current of rapidly rising prejudice and resentment prevailing, so after a farcical trial, he was convicted and executed on August 19', 1692.

His fearless defense of his good wife saved her life and two weeks after his death, she bore a baby in prison and it was no doubt due to her pregnant condition that she too, escaped the fury of the mob.⁴⁶

The trials of Bridget Bishop, Mary Easty, a sister of Rebecca Nurse, the Jacobs family, Martha Carrier and Philip and Mary English, Elizabeth How, Rev. George Burroughs, Sarah Wildes, Susanna Martin, John Williard, Alice Parker, Ann Pudeater, Margaret Scott, William Reed, Samuel Wardell and Mary Parker,⁴⁷ are all interesting and present the details of the most stirring tragedies the courts of justice in this country have ever enacted, but space in this chapter will not permit the detailed account of these various trials.

From the earliest times, a great deal has been written upon the subject of witchcraft and sorcery, in the different languages of Europe. The delusion has furnished a theme for long and arduous treatises by scientist, divine and philosopher and the poet and novelist, has found it a fruitful source of inspiration for song and story.

The works of Dr. Joseph Glanvil, chaplain-in-ordinary to Charles II., and R. Baxter, in his "Certainties

⁴⁶ Upham's "Salem Witchcraft," p. 87.

⁴⁷ Upham's "Salem Witchcraft," pp. 142, 143; Nevin's "Witchcraft in Salem," pp. 70, 253.

of the Works of Spirits," as vindications of the superstitions of witchcraft and sorcery, did much to spread the delusion, during the popularity of the superstition.

Balthazar Bekker, a reformed Dutch clergyman, was the first to strike at the very foundation of the delusion, near the end of the seventeenth century; Hutchinson, in his historical essay on Witchcraft, in 1718, also took a skeptical view of the subject, and these men, with Weier and Reginald Scot, along with the sturdy advocates who defended the prisoners charged with witchcraft, and such judges as Lord Holt, in England, did much to discourage and overcome the belief in the fallacy.

Burn's lines to the "De'il" aptly express the popular notion of the time when the belief in spooks and evil spirits obtained:

"Ae dreary, windy, winter night,
The stars shot down wi' sklentín light,
Wi' you, mysel, I got a fright
Ayont the lough;
Ye, like a rash-bush, stood in sight
Wi' waving sough.

The cudgel in my nieve did shake,
Each bristled hair stood like a stake,
When wi' an eldritch stour, 'quaick, quaick',
Among the springs
Away ye squatter'd, like a drake,
On whistling wiggs."

The notion of the devil then was that he was a large, ill-shaped, hairy sprite, with long tail, horns, cloven feet and wings, as we so often see him pictured in the old representations.

Before Milton's time, he was believed to be a mere mischievous, ugly and petty spirit, who played fantastic

tricks upon humanity, but Milton made of him the paragon of evil, not merely grotesque, but a fiend, whose power was all used for evil.⁴⁸

"The other shape,
If shape it might be call'd that shape had none
Distinguishable in member, joint or limb;
Or substance might be call'd that shadow seem'd,
For each seem'd either,—black it stood as night,
Fierce as ten furies, terrible as Hell,
And shook a dreadful dart; what seem'd his head
The likeness of a kingly crown had on.
Satan was now at hand."⁴⁹

From the history of Demonology and Witchcraft, as given in the works of Bodin, Bekker, Leloyer, De Lancre, Garinet, Mackay, Lecky, Nevins, Upham, Benson, Goodwin and Sir Walter Scott, demons of both sexes had existed in the world, ever since the fall of Adam. They increased and multiplied with wonderful rapidity; inhabited the air and had no fixed residence or abode, and when they congregated, windstorms, hurricanes and earthquakes resulted. They were supposed to delight in destroying the beauties of nature and the possessions of man and entered the bodies of individuals with their breath and caused pains and sickness and bad dreams. All these demons were at the command of any person who would barter his soul to them and his or her evil purpose was then accomplished, but no good action would be undertaken.

In France and England the witches were supposed to ride astride broom-sticks, while in Italy and Spain,

⁴⁸ See article on "Demonology," in *Foreign Quarterly Review*, London, 1840.

⁴⁹ *Paradise Lost*, book ii, Line 666.

the Devil, himself, in the shape of a goat, carried them on his own back.⁵⁰

This belief prevailed for many centuries all over Europe and in certain sections of the world the belief in witchcraft and sorcery is not entirely eradicated today.⁵¹

In 1627, a ballad entitled the "Druten Zeitung," or "Witches Gazette" was quite popular in Germany. The sufferings of the witches burned at Würzburg, Bamberg, Franconia and other cities and provinces of the German Empire, were minutely described, by the poet, who grew quite witty in his descriptions of the contortions produced by pain, when the flames brought forth shrieks from the poor wretches who were burned alive.⁵²

The "Amber Witch," by William Meinhold, being

⁵⁰ II. Mackay's "Memoirs of Delusions," p. 178.

⁵¹ Many of the ignorant Canadian-French still believe in the delusions of the loup-garou, or man wolf, and in the southern portion of Nigeria, as recently shown by P. Amaury Talbot, superstition and witchcraft lurk in all the forests and lakes of the country. Describing these superstitions, in a recent article in the London Telegraph, Mr. Talbot says:

"The bush with its soft green twilight, dark shadows, and quivering lights, is peopled by many terrors, but among these 'Ojje', or witchcraft, reigns supreme. The bird which flies in at your open door in the sunlight, the bat which circles round you at night, the small bushbeasts which cross your path while hunting, all may be familiars of witch or wizard or even the latter themselves, disguised to do you hurt. Sometimes the terror of witchcraft will scatter a whole town."

And for belief in witchcraft, among the southern darkies, see Journal of American Folk Lore, vol. III., p. 205; Bruce's "Plantation Negro as a Freeman"; and Jones' "Negro Myths from the Georgia Coast."

⁵² II. Mackay's "Memoirs of Delusions," p. 277.

the most interesting trial for witchcraft, of Mary Schweidler, is one of the most exceptional and interesting of the books of fiction, based upon the delusion of witchcraft.

But let us draw the curtain upon this continuous human tragedy enacted for two and a half centuries, in Europe, in the name of the law, cataloguing the long list of judicial murders, upon the stage where superstition and delusion alone held sway.

It is sad, in the extreme, to contemplate the long list of human beings whose lives were forfeited, in the early days of "little knowledge," by those who thus:

"Hoped to merit Heaven, by making earth a Hell."

And it is doubly sad, to contemplate that the Temples of Justice were peopled by these fears of fantasy and the imagination—like some of the fetishes that modern critics of our present judicial system erect in some places—and that the high priests of the temples blindly followed the mad cry of the mob and laid aside the scales of justice to interpret the unjust ideals of an intoxicated public sentiment, following only the red flag of murder. These jurists of the past centuries who participated in this wholesale slaughter of individual right, may have feared their recall, if they withstood the frenzy of a wrought-up public clamor, and in this a lesson can be learned, of the danger of following the demands of public sentiment, in courts of justice, instead of the proper ideals of equality and justice.

It is fortunate that only the small percent of the densely ignorant now-a-days, account for the misunderstood facts and phenomena of nature by the fears and delusions of witchcraft and sorcery and that in the

progress of the race, the delusion of witchcraft has been crowded into the dark, remote and rugged sections where alone the foot of civilization can find no resting-place.

There are few, if any, more deplorable episodes, in human history than that of the persecutions for witchcraft. They illustrate to what an extreme degree of relentless cruelty human nature will go, when fanned to a fever-heat of excitement by some fanatical delusion. On the other hand, the history of the persecutions for witchcraft show how little reliance can be placed upon the credibility of witnesses, influenced by some general excitement, or acting under a mistaken belief of duty, based upon the attainment of some popular object. Thousands of witnesses who appeared against the poor victims charged with this hated crime of witchcraft and sorcery, honestly believed in the fantastical delusions and tricks of fancy that they described as actual occurrences, which in fact had no better foundation than their own fervid imaginations.

Regarding man's self, alone, it is difficult to reconcile the beneficent laws taught by the church, with the sad "scope and scheme" of things, as disclosed by the pathetic facts of history, in connection with this subject. And yet:

"You cry 'the cruelty of things' is mystery to your purblind eye,
Which fixed upon a point in space, the general project passes by.

* * * * *

The dreadest sound man's ear can hear, the war and rush of
stormy wind

Depures the stuff of human life, breeds health and strength
for humankind.

And thus the race of Being runs, till haply, in the time to be,
Earth shifts her pole, and Mushtari men another falling star
shall see."

CHAPTER III.

RECALL OF JUDGES.

"Of all the virtues, Justice is the best,
Valour without it is a common pest.

* * * * *

All other virtues dwell but in the blood,
That in the soul, and gives the name of good;
Justice, the queen of virtues."—Waller.

Judge is the generic descriptive name given to one who is invested with the power of judging and deciding causes in the courts of law. The recall, as applied to the judiciary, is the withdrawal of the power given a judge to decide causes.

As justice has always been the great interest of man, on earth, we find that the virtue has ever been extolled, as one of the greatest blessings of the human race and among the earliest institutions of which we have any knowledge, we find that courts were constituted, for the distribution or enforcement of justice, through the medium of judges.¹

¹ Speaking upon the antiquity of courts and judges, John, in his "Babylonian and Assyrian Laws," says: "Partly because specific reference to judges and legal processes are not necessarily to be expected in historical inscriptions, and partly because we do not really know which are the earliest monuments of the human race, it is impossible to decide when law-courts first came into existence. It is generally admitted, however, that the stele of Manistusu is one of the earliest known monuments. There we read of Galzu, a judge. There also we find many of the officials, who later acted as judges upon occasion. Hence it may fairly be said that judges were to be found in ancient Babylonia from time immemorial. They must have decided what was right when there was no written law to which to appeal."

"Babylonian and Assyrian Laws," c. v. p. 80.

The great law-giver, Moses, having learned the hard lesson from the book of human life, early grasped the truth that man's nature needed protection from its own impulses and passions, and that an exalted rule of conduct, commanding what was right, to be effective, must be enforced and interpreted, by a wholly disinterested guiding influence. He accordingly established the administration of justice, among the ancient Israelites, by choosing "able men, out of Israel, such as feared God, men of truth, hating covetousness; and made them heads over the people, rulers of thousands, rulers of hundreds, rulers of fifties, and rulers of tens; and they judged the people at all seasons; the hard causes they brought unto Moses, but every small matter they judged themselves."²

Grasping, even at this early day at the exalted standard, later realized, in the Horatian ideal, "of the just man, who, firm in the consciousness of right, disdains, with equanimity, the frowns of a tyrant and the clamors of a mob," we find this old patriarch, fifteen centuries before Christ, admonishing the judges of the Israelites:

"Thou shalt not follow a multitude to do evil; neither shalt thou speak in a cause, to decline, after many, to wrest judgment."³

Admonishing the judges, further, in regard to being swayed in their decisions, by the fickle winds of public sentiment, Moses said:

"Ye shall not respect persons in judgment, but ye shall hear the small as well as the great; *ye shall not be afraid of the face of man*; for the judgment is God's;

² Exodus, c. 18, 26.

³ Exodus, c. 23-2.

and the cause that is too hard for you, bring it unto me and I will hear it.”⁴

And not content with warning the judges of the danger of fearing the people, in the act of pronouncing judgment, he also warned the people of the duty of respecting the judgments of the courts, in the following wise commands:

“And thou shalt come unto the Priests and Levites, and unto the Judge that shall be in those days and inquire; and they shall shew thee the sentence of judgment. And thou shalt do according to the sentence, which they of that place which the Lord shall choose, shall shew thee; and thou shalt observe to do according to all that they inform thee. According to the sentence of the law which they shall teach thee, and according to the judgment which they shall tell thee, thou shalt do; thou shalt not decline from the sentence which they shall shew thee to the right hand, nor to the left. And the man that will do presumptuously, and will not hearken unto the priest that standeth to minister there, before the Lord thy God, *or unto the Judge*, even that man shall die and thou shalt put away the evil from Israel. And all the people shall hear and fear, and do no more presumptuously.”⁵

It thus appears that the ancient Israelites appreciated the virtue known as Justice and more nearly approximated the cultivated ideal existing in more recent times, for they understood, or Moses did, that it was indispensable, in the act of dispensing justice, for the incumbent of the judgment seat, to rise superior to the popular standards of justice and equality and that the due and orderly realization of the virtue could only be

⁴ Deuteronomy, 1-17.

⁵ Deuteronomy, 17-9, 12.

realized by a proper regard and respect for the judgments of the courts when they were pronounced.

In this respect, the old patriarchs were in advance of the ancient Babylonians and Athenians, for while attempting the distribution of justice, through the medium of disinterested judges, they did not seem to grasp the necessity for an independent judiciary, but upon unjust grounds they permitted the recall and debasement of their wisest judges.

In the oldest Code of Laws in the known world, the code of Hammurabi, King of Babylon, 2285 B. C.,⁶ who claimed to have received his laws from the seated sun-god, Samas, the "judge of heaven and earth;"—an old, Mosaic bearded king, as represented to us, from the dark ages, upon the black block of diorite, presenting also his Code of Laws; known to history as the Babylonian king, who conquered the four quarters of the earth; who enriched Ur (Father Abraham's birthplace), the humble, the reverent, who clothed the gravestones of Malkat with green; the warrior who guarded Larsa and renewed Ebabbar; the Shield of the land who united the scattered inhabitants of Isin; who firmly founded the farm of Kish; the White Potent one who penetrated the secret cave of the bandits; one who recognizes the Right and who Rules by Law; who humbles himself before the great gods⁷—this valiant one of the misty ages of long ago, in his Code, after providing for the death of the man who should weave a spell or put a ban upon another man, in the fifth sec-

⁶ John's "The Oldest Code of Laws in the World."

⁷ New York Independent, Vol. 55, pt. 1,—January-March, 1903—p. 67; John's "Babylonian and Assyrian Laws."

tion of his Code of Laws, provided for the recall or removal of the judges of his courts, by the following provision:

“If a judge has judged a judgment, decided a decision, granted a sealed sentence, and afterwards has altered his judgment, that judge, for the alteration of the judgment that he judged, one shall put him to account and he shall pay twelve-fold the penalty, which was in the said judgment, and in the assembly one shall expel him from his judgment seat, and he shall not return, and with the judges at a judgment he shall not take his seat.”⁸

Petitions and motions for a rehearing were thus interdicted by Hammurabi, regardless of the mistakes entering into the judgment, which could only be righted by a rehearing, or a new trial, and if a new trial were granted, the judge was publicly disgraced and recalled and was never allowed to sit in judgment again.

So unalterably opposed were the ancient Babylonians to the granting of a new trial, that if a decision for the infliction of a penalty were set aside, the judge had to

⁸ John's "The Oldest Code of Laws in the World," p. 2; Code of Hammurabi, sec. 5; John's "Babylonian and Assyrian Laws," p. 44.

A notable case of the recall of judges as late as five hundred years before Christ occurred among the Medes and Persians, who boasted of their unalterable decrees, once rendered by the incumbent of the *dangerous* judgment-seat.

Herodotus tells the thrilling story of the striking example furnished by King Cambyzes, in his final recall of the unjust judge, named Sisamnes. He caused him to be killed and flayed and the judgment-seat to be covered with his skin. He then appointed the son of Sisamnes to be his successor, but charged him, while sitting in judgment, to remember the fate of his father. This example might be resorted to by the agitators for the judicial recall, as a more terrible example to an unjust judge than the mere recall and degradation.

pay it twelve-fold to him from whom it was exacted and for any new trial granted by him, the judge was publicly deposed from his office and expelled from his seat of judgment and no longer permitted to sit with the judges. According to the strict letter of the Code, it was no justification for the judge to be able to show that the new trial was granted to prevent a miscarriage of justice, for as the law reads, a judgment once pronounced was irrevocable, for that judge, at least.⁹

But let us look more minutely into the procedure, governing the right of litigants in the days of Hammurabi. It was the prerogative of the King, during the First Dynasty, to send to the local judges his own decision of a cause, or to simply send the case to them for trial.

Trials were held in the great temple of Ebabbarim, at Sippara, where copies of his code had been set up by Hammurabi, at the temple of Merodach in Babylon, at the temple of Sin, at Larsa, or the temple of Ishhara. Witnesses, it seems, were sworn, before God and the King, to swear to the truth, touching the controversy, and documentary evidence was used, much as it is today, to establish a right or title by written evidence, or the agreement of the parties.¹⁰ Having ascertained where the right resided, it was the peculiar province of the judge to "cause them to receive judgment"; the strife was accordingly quieted and the judgment passed into an irrevocable decree, which the judge

⁹ John's "Babylonian and Assyrian Laws," p. 82. Whether the reversal of an erroneous judgment was provided for by appeal, does not appear, from the Code.

¹⁰ John's "Babylonian and Assyrian Laws," p. 90.

himself could not set aside, without thereby working his own disgrace and recall.¹¹ The decision was drawn up by the scribe and placed upon a tablet, sealed by the judge and some of these irrevocable tablets, as imperishable conclusions of these ancient law-suits have come to us, after thousands of years, to tell their tale.¹²

¹¹ *Ante idem.*

¹² *Ante idem.* p. 92.

"Shamash-bel-ili sues Nidnusha concerning a house bought by him of her. The judges grant him two sheckels of silver. Hammurabi I."

"Shi-lamazai sues her brothers for a field and wins her case."

"Zariku was put to the oath and replied to Erib-Sin. He was told that as his domicile was at Sippara, he must not make his appeal to the judges of Babylon, so his case was dismissed. Hammurabi 28." This was a case of the wrong venue and hence, a lack of jurisdiction over the subject-matter.

"Ilushu-abushu hired a pack-ass, of Ardi-Sin and Silli-Ishtar and lost it. The judges awarded them sixteen sheckels of silver as compensation. Apel-Sin. 5."

"Mar-ersitim left a female slave, Damiktum, to Erib-Sin. His wife and brother disputed the legacy. The judges inspected a document by which Erib-Sin had granted the slave to his wife, so they return her to the wife. Hammurabi."

"A slave, Bariki-ilu, was pledged for twenty-eight sheckels to Ahinuri, in the thirty-fifth year of Nebuchadnezzar. In the next year we find him in possession of Piru, his wife, Gaga, and a cousin, Zirra. They sold him for twenty-three sheckels to Nabu-Zer-ukin. He must have fled from his new master, for four years later the same people pledged him. He was not a satisfactory pledge, for next we find that Gaga's daughter, about to be married, this slave was set down as a part of her marriage portion, and she gave him to her husband and his son, and he remained in their possession, but when his mistress died, he was handed over to the great banker, Itti-Marduk-balatu. During the reign of Nabonidus, the slave, Bariki-ilu, attempted to establish his freedom, by pretending to be the adopted son of Bal-rim-ani, but was made to confess that he had twice run away from his master and had been many days in hiding, so it was adjudged that he must return to servitude." John's "Babylonian and Assyrian Laws," p. 181.

This recipient of the wisdom of the sun-god, Hammurabi, did not stop with humiliating and degrading the upright judge, who, to right a wrong judgment was willing to admit his error to the advantage of a wronged litigant, by granting a new trial, but in keeping with such a mistaken standard, the Code of this ancient ruler of the Babylonians also punished the unsuccessful surgeon, by removing the hand that performed an unsuccessful operation;¹³ by penalizing the unsuccessful veterinarian, who lost his neighbor's cattle or horse;¹⁴ the builder was made liable for all damages resulting from the fall of a building he had erected¹⁵ and, in general, it was the policy of this strict king, to raise the standards of public duty, by punishing the incumbents of public office and penalizing the members of the learned professions and vocations, rather than cultivating the higher standards of the professions, by the elimination of the unskilled therefrom.

The ancient Greeks also practiced the recall and ostracism of their most eminent judges and other powerful public officials, who incurred the ill-will of the populace, because of some unpopular decision, or the envy of any considerable number of citizens, because of some alleged undemocratic performance.

This ostracism, or recall, in Greece, is said to have been established by Cleisthenes after the expulsion of the Peisistratidae¹⁶ and the nature and object of the

¹³ Code Hammurabi, Sec. 215; John's "Babylonian Laws," p. 63.

¹⁴ *Ante idem.* Sec. 225; John's "Babylonian Laws," p. 63.

¹⁵ *Ante idem.* Sec. 229; John's "Babylonian Laws," p. 64.

¹⁶ Diod. Sic. xl, 55; Aelian, V. H. xiii, 23; Smith's Greek and Roman Antiquities.

recall, as then obtaining, is thus explained by the philosopher Aristotle:

“Democratical states *used to* ostracise and remove from the city for a definite time, those who appeared to be preeminent above their fellow citizens, by reason of their wealth, the number of their friends, or any other means of influence.”¹⁷

The removal and ostracism of public officers, in Greece, does not seem to have been used as a punishment for any crime or particular unfitness developed by the official removed, but rather as a precautionary measure, to dispense with the services of those who became so powerful as to excite the fear or attract the envy of their contemporaries.¹⁸

The procedure whereby the recall or ostracism of a judge or other public official was accomplished, in ancient Greece, was as follows: A space was enclosed by barricades, with ten entrances, for the ten tribes. The tribesmen entered the enclosed space, by these ten entrances, each with a shell, or piece of earthenware, on which he wrote the name of the official he wished recalled or degraded. The casting and enumeration of the vote was regulated and supervised by the presidents of the Senate and by the nine archons, and if as many as 6000 votes against any one official was polled, this *ipso facto* removed him from office and he was obliged to leave the city of his residence within ten days from that date; but if the total number of votes cast against him did not equal 6000 he was not removed

¹⁷ Polio. iii, 8.

¹⁸ Smith's Dictionary of Greek and Roman Antiquities, *sub nom.* *Banishment.*

from office.¹⁹ Because of the shell, or piece of earthenware, upon which the vote was cast against the official removed from office, the proceeding came to be known as the "earthenware scourge."²⁰

By this proceeding, in ancient Greece, some of the most distinguished men of the nation were removed, or ostracised, but when it was found that their services were indispensable to the public welfare, they were recalled to office. Cimon, Alcibiades, Themistocles, Aristides and many other prominent citizens suffered this degradation in Athens and other democratical states, in Greece, for the recall was considered as a necessary precaution to ensure absolute equality among the citizens of the various commonwealths.

As a concrete illustration of the application of the recall to the judiciary, in Greece, we will take the case of Aristides, known as "Aristides the Just." There is authority for the statement that the judicial integrity and ability of this old Greek patriot was so generally recognized, in Athens, that during the presentation of one of the tragedies of Eschylus, when one of the characters was referred to as a man who "cared more *to be just*, than to appear so," all eyes were instantly turned toward Aristides, as the one man, who, of all other Greeks, most merited the title of "The Just," and from this time on this truly royal, or divine appellation, according to Plutarch, was, by universal consent, attributed to this virtuous man.²¹

¹⁹ Schol. in Aristotle, *Equit.* 865; Smith's *Greek and Roman Antiq. supra.*

²⁰ *Ante idem.*

²¹ Plutarch's *Lives.*

This remarkable distinction aroused envy against Aristides and it is reported that Themistocles circulated a rumor that by determining and judging causes in private, he was undermining the courts of judicature and was secretly making way for a monarchy in his own person, so the jealousies of the populace were so aroused against him that it was decided to recall this upright judge. Plutarch relates the pathetic circumstance, connected with the degradation and ostracism of this Just Judge, that while the voting was taking place, in the railed market-place, Aristides was approached by an illiterate citizen, who handed him his *ostrakon*, or sherd and directed him to write his own name upon the shell. Without disclosing his identity, Aristides asked the man if the Judge had ever done him any injury, when the voter replied: "None at all, neither know I the man; but I am tired of hearing him everywhere called *The Just*."²²

Aristides made no reply to the man, but wrote as he directed and returned the sherd to him, with his name written upon it. The six thousand votes, necessary to procure his removal, or recall, having been polled, he departed from his beloved Athens, praying, with uplifted hands, that the Athenians might never have occasion to remember Aristides.²³

²² Plutarch's Lives.

Aristides, from the history of the man, as given us by Plutarch was to be classed with that altruistic lot of patriots:

"Who cared not to be great
But as they serve or save the State."

²³ Plutarch's Lives.

The ostracism of Aristides did not last for the ten years, for which his punishment was decreed, under the Grecian law, however, for three years later, when the Persian king, Xerxes, invaded Greece, Aristides returned and when the Persians were overcome he was completely reinstated in the good graces of his countrymen and took a leading part in the affairs of the government of Athens, without resentment, for he sought no other gratification than that of serving his country with fidelity and honour.

Themistocles was another of the great citizen jurists of Athens to suffer the recall or ostracism, by popular vote, while this ancient law obtained in Greece.

As an index to the character and uprightness of this distinguished Athenian, it is reported that before entering upon the trial of a cause in which the poet Simonides, of Ceos, was interested, when requested, by his friend, to overlook the underlying principles of the law, in the consideration of the cause, this virtuous judge replied:

“Simonides, you would be a bad poet, if your lines ran counter to the just measure and rules of your art, nor should I be a good magistrate, if, for favor, I made false law.”²⁴

Notwithstanding the signal and loyal services of this patriotic citizen in the war with the Persians and his long service as a magistrate, when Themistocles finally erected his temple of Diana of Best Counsel, with himself represented by a figure in the temple, the Athenians also became envious of him and made use

²⁴ Plutarch's Lives.

of the law providing for the recall and ostracism in order to humble his eminence and authority, as they usually did with all those whom they believed to have grown too powerful, for the equality deemed requisite in a popular government, for, as said by Plutarch:

“The ostracism was instituted not so much to punish the offender, as to mitigate and pacify the violence of the envious, who delighted to humble eminent men, and who, by fixing this disgrace upon them, might vent some part of their rancor.”²⁵

According to Aristotle, the law providing for the recall or ostracism of public officials, by popular vote, in Athens, soon became mischievous, for:

“Men did not look to the interests of the community, but used ostracism for party purposes.”²⁶

The last person against whom this old law was enforced at Athens, was Hyperbolus, a demagogue of low birth and mean habits; the Athenians considered that in applying this law to such a person, their own dignity had been compromised, so the law providing for ostracism or recall, by popular vote, in Athens, was discontinued.²⁷

The law providing for the recall or ostracism of public officers, by popular vote, known as “Petalism” among the Syracusans, was borrowed from the Athenian law of ostracism. This species of recall, took its name from the petals or leaves of the olive, on which

²⁵ Plutarch's *Life of Themistocles*.

²⁶ Aristotle, c. 7, p. 135; *Smith's Dictionary of Greek and Roman Antiquities*.

²⁷ Plutarch's *Life of Aristides*; *Smith's Dictionary of Greek and Roman Antiquities*.

was written the name of the person whom the citizens voted to recall.²⁸

Under the law of the Syracusans, known as "petalism," the removed officer or judge was banished for a period of five years only, as this was considered a sufficient length of time to humble the pride and destroy the hope of the degraded one.

Historians tell us, however, that this law of recall known as "petalism," by which the Syracusans voted to recall their distinguished men, by writing their names upon the corolla, or leaf-part of the olive, did not long continue in effect, since the fear of this "degradation or humbling," deterred the best qualified among the citizens from taking any part in public affairs, and the degeneracy and bad government which resulted from the selection of only the lowest types of demagogues for public officers, led to the repeal of the law, B. C. 452.²⁹

In the early Roman days the custom also obtained of submitting to the people, by popular vote, the determination of accusations against judges and other public officers, as matters of general public interest and the *judicia publica* of later times owed its existence to this antique custom. *Prætors*, or those invested with judicial functions were no exception to the general rule, but all classes of public servants were directly responsible to the Roman people and were liable to be called upon, at any time, to answer to a charge which might mean banishment or death.

²⁸ Smith's Dictionary of Greek and Roman Antiquities.

²⁹ Niebuhr "History Rome," i, 504; Diod. Soc. xl, c. 87; Smith's Dictionary of Greek and Roman Antiquities.

In the early days of the Republic, every act of a citizen which was deemed injurious to the State, or its peace, was called *perduellio*, and the offender (*perduellis*) was tried before the forum of public sentiment (*populi iudicio*) and, if convicted of any violation of the obligations he owed to the State, he was put to death.³⁰ The crime known as *Majestas*, corresponding to the English charge of treason, was apt, at any time to be preferred against the most upright public servant and the opinions of the populace were found frequently at variance with the justice of the cause. Justice was not always found to be consistent with the expressed will of the multitude of Roman citizenship, for their opinions were not always shaped or controlled by the most exalted standards of equality. Unpopular officials were frequently condemned, regardless of the reason for the unpopularity, while the able orator or popular citizen, was usually successful in his cause.³¹

Under the empire, judicial magistrates, such as *Praetors*, were removed, at the will of the Emperor, and we find that while Julius Caesar had appointed sixteen, to settle the disputes of the Romans, Augustus peremptorily removed four and thus reduced the number to twelve.³²

The early Anglo-Saxons, like the Israelites of patriarchal days, while recognizing that the power of distributing or enforcing justice, was primarily lodged with the people, as a whole, constituting the great body of society, understood the impossibility of administer-

³⁰ Livy, ii, 41; *idem*, vi, 20.

³¹ Gaius, i, 2; *idem*, 20; Tacitus, History, i, 84.

³² Niebuhr, History Rome; Livy, Sallust, Tacitus, Arnold, Gibbon.

ing justice, in the concrete, by delegating the performance of such important functions, without investigation or the understanding of correct ideals, to the great unskilled mass of the people, in their collective capacity, so apt to be carried away, in such matters, by variable sentiments, or whims or caprices, based upon impulses, not always consistent with the proper standards of right.

In order to insure the rendition of justice to every individual, or to approximate as nearly as might be, to this object, this important power was committed, therefore, at a very early day, in England, to specially selected magistrates, possessing peculiar skill and fitness to hear and determine causes in courts of law and qualified, by study and training to discharge these difficult public functions with certainty and expedition, according to correct standards.

Following the beneficent policy, illustrated by the old Mosaic code, of bringing justice home to every man's door, as nearly as may be, it was the general plan of Anglo-Saxon society, as designed and shaped by the great King Alfred and other early kings, to have such a system of courts as would speedily dispense justice to all the people, under the various conditions of society. Anglo-Saxon courts did not have the means of compelling obedience to their mandates for the majesty of the law was not the rule implicitly followed by all classes, in the beginning, but before many centuries, following King Alfred's time, we find that it had become the fixed rule of life.³³

³³ I. Pollock and Maitland *History English Law*, p. 37.

From the early *gemot*, of the Anglo-Saxon period, we soon find the regular county court and hundred court, where poor and rich alike were entitled to receive justice, without price and without delay.³⁴ The expeditious court of *piepoudre*, (the dusty foot court)—which dispensed justice as speedily as dust falls from the foot³⁵—furnished speedy justice for small cases, while the *curia regis*, established by William the Conqueror, held in the royal palace, presided over by the king himself and his chief justiciar, with court barons, presided over by the lords of the realm, furnished, for many centuries a complete system of judicature for the hearing of the ordinary causes in the realm.³⁶ The King was the fountain of justice and it was his business to see justice done, where the litigant failed to get his cause heard in the jurisdiction of his own hundred. Of course as a natural result of such a policy, the right of dispensing justice and receiving the profits thereof, under the Normans, soon became hereditary rights, passing to successive lords, whose judgments were supreme, unless the King himself ordered the entering of a certain judgment.³⁷ The Court of Kings Bench, the Court of Common Pleas and the High Court of Chancery, by gradual processes of time, succeeded to the principal places among the courts of later centuries, with the establishment by Henry II, A. D. 1176, of the

³⁴ *Ante idem*, p. 42.

³⁵ Coke, 4 Inst. 272.

³⁶ I. Reeve's *History English Law*, 264; I. Pollock and Maitland's *History English Law*, 40, 45.

³⁷ I. Pollock and Maitland's *History English Law*, pp. 72, 73; *Memoirs de la Societe des antiquaires de Normandie*, vol. xv, pp. 196-197.

justices itinerant, who divided the realm into six circuits and afterwards followed a fixed judicial system.³⁸

From the reign of William the Conqueror, until that of King John, the administration of Justice was still kept in the hands of the king, who was regarded as the source of all justice and law; after the conquest, the various prerogatives of the crown were increased and it was during this precarious state of the law that the subjects were obliged to purchase the favor of the sovereign, in order to obtain justice in the king's courts.³⁹

So dependent upon the will of the sovereign was the tenure of the judge, during the reign of Richard I, that we find William de Longchamp, chief justiciary and chancellor, was removed from his office, by the intrigue of John, Earl of Morton, the king's brother.⁴⁰

Judges were then but the servants of the king and he could move them about as mere pawns upon the chess board of his own expediency, or dismiss them, at a moment's notice, if they refused to do his bidding.⁴¹

³⁸ I. Reeve's History English Law, 273.

³⁹ I. Reeve's History English Law, pp. 283, 465, 466.

⁴⁰ I. Reeve's History English Law, 280.

The conditions existing before the Barons exacted from King John the various guaranties of the Great Charter are known to all readers of English History. The reasons why they stipulated that "Right shall not be sold, delayed or denied"; that the king should only appoint "justiciaries, sheriffs and bailiffs, of such as know the law of the land and are disposed duly to observe it" is emphasized by a consideration of the many highhanded proceedings that the people of that long suffering country had been subjected to before this Great Charter of liberty was exacted from King John. (I. Reeve's History English Law, 471, 472.)

⁴¹ I. Pollock and Maitland's History English Law, p. 204.

Hubert de Burgh succeeded Hubert Walter and Geoffrey Fitz Peter, as Chief Justiciar, but he seldom sat on the bench and was removed in 1232,⁴² when the Chief Justiciarship was committed to a lawyer, named Stephen Segrave. The latter was disgraced and dismissed by the King, in 1234, just two years after his appointment and from this period until 1258, or until the revolution, the justiciarship was in abeyance.⁴³

In lieu of an appeal, or writ of error, which challenged the sufficiency or correctness of a record or judgment, instead of the judge himself, we find that from the time of Cnut, until the reign of Henry I, if a judgment was challenged the proceeding was what was known as that of "false judgment," growing out of the practice of early Saxon days, when a litigant who was dissatisfied with a decision or "doom," charged the doomsman who uttered it with falsehood.⁴⁴

Until the thirteenth century the exception to a given judgment or decree of an inferior court was tested by the charge of "false judgment." The record was transferred from the inferior tribunal to the superior one by certain knights, appointed for the purpose. Frequently, these knights would challenge the litigant questioning the correctness of the judgment to trial by battle, to test the correctness of the decree⁴⁵ but if this were not done, and the issue upon the legality of the finding of the lower court thus determined, the justices of the king's court proceeded to examine the record.

⁴² *Ante idem.* p. 204.

⁴³ *Ante idem.*

⁴⁴ Cnut, ii, 15, sec. 2; Edgar 1, 3; Brunner, D. R. G. ii, 356, 365; II. Pollock and Maitland's History English Law, 666.

⁴⁵ II. Pollock and Maitland's History English Law, 667.

If the King's Justices found, on an examination of the record that the judgment of the county, the hundred or the manor, were wrong, a fine was assessed against the judge rendering the erroneous judgment and by a finding of "false judgment" a Lord lost forever the right to hold a court.⁴⁶

Here was a method of recall, almost as bad as that existing under the Babylonian Empire, for instead of removing the judge who attempted to right a wrong, he was removed before having been given the opportunity to get right.

As late as the year 1219 we find that the justices in eyre were brought before the justices of the Court of King's Bench, upon a charge of "false judgment," for having unlawfully condemned a man to death and upon examination of the record by the Council, their judgment was set aside and they were amerced with a fine for having entered such a "false judgment."⁴⁷

It is little wonder, with this harsh rule obtaining, that by the time of Edward I. history records that his justices had become extremely cautious men, unwilling to decide nice points of law but referring every close question to the Council for instruction.⁴⁸ The penalty of a mistake or "false judgment" to them meant not only a fine, but disgrace and the recall, if the King saw fit to so punish them, so this was not only calculated to

⁴⁶ Note Book, Pl. 1412; Glanvill, viii, 9; Edgar, iii 3; Cnut, ii, 15; Leg. Will I, 39, sec. 1, II. Pollock and Maitland's History English Law, p. 667.

⁴⁷ Note Book, Pl. 67; Note Book, Pl. 1166; II. Pollock and Maitland's History English Law, p. 668.

⁴⁸ II. Pollock and Maitland's History English Law, p. 672; Bracton, f. 186.

make a man cautious, but to prevent those of skill and dignity from risking the expression of their judgment, when the penalty for a mistake was such that it might forever ruin the future life and hopes of the judge pronouncing judgment. The strange thing is that with such a system, any self respecting man could be found to undertake the performance of functions such as those required of a judge, when his behavior was the means of ruining his future life, regardless of his pure intentions in the performance of his official duty.

The tenure of office of the English judge continued for centuries, to be at the pleasure of the Crown, and under the Plantagenets and the Tudors, a Chief-Justice even, might be removed, like any other officer of the King, at the pleasure of the sovereign,⁴⁹ and during this whole period we find that the standards of the judiciary were in keeping with this servile and undignified conception of the duties of such an office, for the judges, with but few exceptions, during this period of servile attachment to the Crown, were men of but mediocre ability, willing to prostitute their high offices, to hold the esteem and favor of their patron.

It was thus found, by experience, in England, that the proper discharge of the impartial duties of the courts was consistent only with the maintenance, at all times, of their dignity and independence, hence, it was enacted, by statute, (13 William III, c. 2) that the commissions of judges were to be held, not as formerly, during the mere pleasure of the king, but so long as they should conduct themselves uprightly. They can only be removed from office, upon the address of both

⁴⁹ Verplanck.

houses of Parliament and since the reign of George III, the commissions of judges are not terminated with the death of the king, but they continue to hold their office, notwithstanding the demise of the king. during their good behavior, or until removed by the joint action of both houses of Parliament.⁵⁰

And not only did the English law raise the incumbent of the judgment seat to a plane where he could view, with disdain the frowns of the tyrant in the performance of his official functions, but that he might also be free from the clamors of the populace, he was exempt from indictment for any judicial act honestly done, or omitted, while sitting as a judge. In other words, while acting in a judicial capacity, judges were not liable for an honest mistake, but only for fraud or corruption.⁵¹

The judge is criminally and civilly liable, by the English common law for judicial acts willfully and maliciously done; for acts clearly in excess of his proper jurisdiction and for the wrongful exercise of a mere ministerial act, whether honestly done or not,⁵² but this was the full limit of his liability and for honest mistakes in the performance of his duty, he was responsible to no one and could be troubled only by an accusing

⁵⁰ I. George III., c. 23.

It has long been axiomatic, in England, that the Crown even, cannot interfere with the disinterested performance of its powers, by the judiciary. 2 Hawk. P. C. 2.

⁵¹ Yates vs. Lansing (N. Y.), 5 Johns xx. 282; Hamilton vs. Williams, 26 Ala. 527.

⁵² State vs. Graves, 8 Mo. 148; 40 Am. Dec. 131; Stone vs. Augusta, 46 Me. 127; Revill vs. Pettit, 60 Ky. 314; Reed vs. Conway, 20 Mo. 22; Gault vs. Wallace, 53 Ga. 675; Cope vs. Rainey, 49 Tenn. (2 Heisk.) 197.

conscience for a mistake in the performance of a proper judicial function.

Since the placing of the English judiciary upon this high plane where the courts are wholly above and beyond the spoils of party or the favoritism or fears of sovereignty, the respect paid to the majesty of the law in that country, has challenged the admiration of the world. English procedure is the pattern for the best governed countries on the earth and the decisions of her courts have come to be ideals to be followed by courts of other nations, seeking the attainment of justice.

The patriot fathers, familiar with the mistakes of the ancients and the reasons for the establishment of the judicature of England, upon an independent foundation, in the establishment of the judicial system in the United States, adopted the method that history had commended to England, of life tenure, with the power of removal for actual misfeasance in office.

It was therefore provided in the Federal Constitution that judges of the courts of the United States should hold their offices during good behavior and they were subject to removal, only by impeachment, like other civil officers of the Government.⁵³

The first Congress, in 1789, enacted the first federal judiciary act, formulated by Oliver Ellsworth, a member of the convention which framed the Constitution and afterwards Chief Justice of the Supreme Court.

Speaking of this earnest patriot, Mr. Webster said that he was "possessed of the clearest intelligence and

⁵³ U. S. Con. Art. III., sec. 1.

deepest sagacity as well as the utmost purity and integrity of character."

Upon the relative functions of the different branches of government and the necessity for an independent judiciary, Chief Justice Ellsworth said:

"If the general legislature should, at any time, overleap their limits, the judicial department is a constitutional check. If the United States go beyond their powers; if they make a law, which the Constitution does not authorize, it is void; and the judiciary power, the national judges, who, to secure their impartiality, *are to be made independent*, will declare it to be void. On the other hand, if the States go beyond their limits, if they make a law which is a usurpation upon the general Government, the law is void, and upright, *independent judges* will declare it to be so."

This, by the gentleman who reported the bill in Congress for the organization of the judicial department of the general Government, demonstrates that those who formed our Government and framed our Constitution, realized not only that the judgment seat should be dominated by "the cold neutrality of an impartial judge," but that this essential prerequisite to the administration of justice, could not be obtained by a cringing judiciary, depending upon a vacillating public sentiment, as an index to its opinions, but would be effectuated only through the untrammelled judgment of an independent court.

Next to Oliver Ellsworth, the man most active in the establishment of our Federal Judiciary, was perhaps Alexander Hamilton, and upon the reasons for an absolutely independent judiciary, this great lawyer, soldier and patriotic statesman, observed:

"This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill-humors which the arts of

designing men or the influence of particular conjunctures sometimes disseminate among the people themselves and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the Government and serious oppressions of the minor party in the community.'⁵⁴

It was also clearly the object of the original thirteen colonies to remove the judiciary from politics and thereby establish the independence of the State Judiciary, as well as that of the Federal Government, for the Constitutions of each of the original colonies provided for an appointive judiciary.⁵⁵ Georgia alone set the bad example of providing for an elective judiciary, by direct vote of the people, for a short term, a practice that historians believe has caused much of the degradation and humiliation of the state courts, in the past century.⁵⁶

In most of the other states in the United States, the medium was selected, between the life tenure and the complete independence of the judiciary upon the one

⁵⁴ See Paper "The Judiciary and Public Sentiment," read before Mo. Bar. Assn. at St. Joseph, Mo., September, 1906, Proc. 24' Annual Meeting of Association.

⁵⁵ See interesting article on "Recall of Judges," by Albert Fink, in North American Review, vol. 193, p. 680.

The Massachusetts Bill of Rights, adopted in 1780 declares:

"It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit." Would that more of the States had followed this lead of the Great Commonwealth of Massachusetts.

⁵⁶ Upon this subject, Dr. Fiske observed: "It was Georgia that, in 1812, set the bad example of electing judges for short terms by the people, a practice which is responsible for much of the degradation that courts have suffered in many of our states and which will have to be abandoned before a proper administration of justice can ever be secured."

hand, and the recall and disgrace of the judge, without the formality of a trial, upon the other, and it was provided for the election of judges, for short terms of office, subject to impeachment by the legislative branch of Government, in cases of misfeasance in office.⁵⁷

In one state alone was the English method adopted of appointing the judges for life, or during good behavior, although four other states have the appointive judiciary, and it is not strange that in this one state we find the strongest state court in the United States and the one whose judgments are received by the various courts of the other states with the highest degree of respect.⁵⁸

By both the Federal and State Constitutions, in the United States, the judiciary has always been regarded as an equal and co-ordinate branch of government, with the legislative and executive. It was accordingly held, within the past century, that neither the President nor the Governor could remove a judge, during the term of office for which he was elected or appointed,⁵⁹ but the only way to remove or recall a judge, was by impeachment for criminal or corrupt conduct.⁶⁰

It is thus a serious question whether the experience of the past century, in the United States, has vindicated the method followed in so many states, of selecting

⁵⁷ Thorpe's American Charters, Constitutions and Organic Laws.

⁵⁸ Massachusetts and New Hampshire judges are appointed and hold during good behavior, but in New Hampshire the judge is subject to recall by the Legislature and on four different occasions, judges have been removed in that state by this method.

⁵⁹ United States vs. Guthrie, 58 U. S. (17 How.) 284; State, ex rel, Vail, vs. Draper, 48 Mo. 213.

⁶⁰ Evans vs. Foster, 1 N. H. 374; McDowell vs. VanDusen, 12 Johns. 356.

judges, for a moderate term, by an elective system, subject to impeachment for positive misfeasance in office. Many protests, other than the growing demand for a popular recall of judges, may be directly or indirectly traced to this method of selecting judges and as the demands and protests come from states where the tenure to office is for the shorter terms, it seems that this general policy, when applied to the judiciary, is condemned both by the examples of history and the practice and experience of the past century, in the United States.

There is little doubt but that the great Chief Justice Marshall would have been recalled, after his decision against the Government, in the trial of Aaron Burr, for treason, if the recall of judges by popular vote had then obtained, in the United States. The power of Jefferson's administration was used, unsparingly, to obtain Burr's conviction, and he was already convicted in the forum of public sentiment, for the populace believed him guilty. The Chief Justice, however, firm in the consciousness of right, with the true judicial poise, disdained, with equanimity, the clamor of the populace and refused to sacrifice the individual, to appease the public wrath.⁶¹ No wonder that through the genius of this patriot, the Court he presided over was "placed upon a pedestal of imperishable granite and has become the admiration of the publicists throughout the civilized world."⁶²

⁶¹ From Address delivered by Judge John F. Phillips, December 22', 1912, at Omaha Club, Omaha, Nebraska, upon the "Judicial Recall."

⁶² *Ante idem.* The great Wirt was asked, after the Burr trial: "Why did you not tell Judge Marshall that the people of America

If such a system had then obtained, the country would have been denied the genius and ability of this just man, for he would never have been responsible to the fickle flames of a vacillating public sentiment for the correctness of his opinions. Addressing himself upon the necessity for an absolutely independent judiciary, Chief Justice Marshall said:

“It is to the last degree important that he should be rendered perfectly and completely independent with nothing to control him but God and his conscience.”

Strange, is it not, that the opinions of our patriot fathers should so nearly approach the views of the patriarchs of the Mosaic period, upon the qualifications of the judge, for they too, believed that the courts should be presided over by “able men out of Israel, such as feared God, men of truth, hating covetousness” and when appointed to judge between the alleged rights of the ancient Hebrews, they were admonished by the Great Law Giver: “Ye shall not be afraid of the face of man, for the judgment is God’s.”⁶³

Right well did Moses warn the ancient judges of the Israelites against the fear of men in the prerogative of the judgment seat, for public sentiment has ever proven variable and the proper and just ideals do not always govern the multitude. We have seen them to-day cry “Hosanna” and to-morrow “Crucify Him.” And since

demand a conviction?” And his reply showed not only the high-minded, professional gentleman that he was, but the patriotic citizen as well. It was: “Tell him that? I would as soon have gone to Herschel and told him that the people of America insisted that the moon had horns as a reason why he should draw her with them.”

⁶³ Deuteronomy, 1-17.

the day when Pilate released Barabas and delivered the Nazarene to the multitude, because it was popular for him to do so, the judge who feared "the face of man" has been deemed unworthy of the trust and dignity of the judgment seat.

The millions burned at the stake, during the witchcraft craze, in Europe, were convicted before judges whose independence had not been established by the laws of the realm and they simply followed the expressed will of the multitude in the act of pronouncing judgment.⁶⁴

In our own country, during the spread of this delusion, in Salem, Massachusetts, before the courts were presided over by judges appointed for life, there were nineteen innocent persons burned or hanged for witchcraft in less than one year, and of these fourteen were women.⁶⁵

In the case of the gentle Rebecca Nurse, hanged on Gallows Hill, on July 19, 1692, after her acquittal by a jury, because the people demanded her blood, and a subservient judiciary bowed in humble submission to the *vox populi*, we find one of the most unjust instances of the "recall of judicial decisions" in the history of any country and one of the grossest travesties upon justice that has been produced.⁶⁶

The fear of the recall of judges, in France, during the provisional Republic, following the French Revolution, caused the judges to send a poor weak woman to

"Dr. Sprenger, in his "Life of Mohammed" says 9,000,000 were burned.

"Upham's "Salem Witchcraft in Outline"; Nevin's "Witchcraft in Salem Village."

"Upham's "Salem Witchcraft in Outline."

the guillotine, because she possessed the foibles of her sex and the flower of the aristocracy of the country was sent innocent to their death, because a wrought up multitude demanded their slaughter. Oh, for the glory of an independent judiciary, in such a crisis and what a valuable lesson history affords against the precedents made by public sentiment.

The courts alone protect the rights of the minority, for the legislative and executive are subservient to the expressed will of the majority. In the courts, however, the property of the rich and the poor alike is protected from the might of the powerful and the will of the majority, because the law of the land, in recognition of the right of the minority to enjoy life, liberty and property, in this free land of ours, has provided that no property can be taken, however popular it might be to appropriate it, without just compensation, after a trial, upon due process. But when the judges were but the servants of the majority, of course the wishes of the majority controlled them, hence the necessity of making them independent of both the majority and minority.

We have seen how the recall of judges by popular vote, in Babylon and Greece weakened and destroyed their independence and made them subservient tools of the popular and great leaders of the majority; that in time the respect of the community for the judges so situated was completely destroyed and that the fear of humiliation and disgrace prevented gentleman of dignity and ability from seeking such a precarious place and the whole judicial system was thereby perverted and deranged.

Commenting upon the condition which the recall of judges by popular vote brought about in Greece, we have the valuable testimony of Aristotle who said:⁶⁷

“Those who have any complaints to bring against the magistrates say: ‘*Let the people be judges*’; the people are too happy to accept the invitation and so the authority of every office is undermined. Such a democracy is fairly open to the objection that it is not a constitution at all, for where the laws have no authority there is no constitution.”

The framers of our constitution were familiar with the experiments of ancient Greece and the mistakes of the early Anglo-Saxons, and this is why the Constitution guarantees to “every state in the union a Republican form of government.”⁶⁸

Shall the illuminating precedents of history, ever be forgotten; shall the land-marks of the fathers and the light-houses, planted upon the shoals upon which other ships of state have floundered, be torn away? Are the secrets of the old dooms day books of the Anglo-Saxons, to be read in vain and the mistakes of the law of ostracism of the Athenians and the discarded and condemned law of petalism, of the Syracusans, to be adopted in the United States, in the twentieth century?⁶⁹

If the day shall ever come, in the United States, when

⁶⁷ North American Review, Article by Albert Fink, vol. 193, p. 690.

⁶⁸ North American Review, vol. 193, p. 673, for decisions holding that a Republican form of Government is one where the whole people are represented by their representatives.

⁶⁹ Mr. Rome G. Brown, in his interesting paper before the Minnesota Bar Association, confidently asserts that the United States Supreme Court ought to hold the judicial recall, in the United States as contrary to the Federal Constitution, because a denial of the Republican form of Government, guaranteed by this immortal document.

this mistaken custom of the Babylonians and the ancient Athenians shall be generally established, and the disappointed suitor and political demagogue can gather his associates and bid the judge come down from his judgment seat to answer the excited multitude for the correctness of his judgments, then the safeguards of the Constitution, guaranteed to us by the patriot fathers will be trampled under foot; this will cease to be a Government of law and become a mere aggregation of people, where law is not the rule of life.⁷⁰

The statesmen of ancient Greece found that the judge could not be safely tried by political methods, for the elements of personal ambition, favoritism, money interest, envy and divers other equations, were likely to be used in passing upon the qualifications of the judge, when arraigned before the forum of a wrought up public sentiment. Nor would it be different in any other country, under similiar conditions.

In the days of Hammurabi, when the courts were so much concerned about the trials of those supposed to "weave spells over a man" and his guilt or innocence was determined by his survival of the torrent of the "holy river;" when the standards of justice were such that the surgeon, who was unsuccessful in an operation, lost his hands; when the veterinarian paid for all the stock he could not cure; the builder, or artisan, all damages resulting from a house he had built after-

⁷⁰ See Excellent Paper of Judge John F. Philips, read at Omaha Club, Feb. 22', 1912.

If such a custom generally prevailed, it is probable that in the due course of time we would indeed have:

"Red ruin and the breaking up of laws."

wards falling down. When, in all the relations of life—save that of the royal prerogatives—the test of human action was the exalted ideal of infallibility, then the judge who set aside a judgment was humiliated and disgraced and peremptorily removed from office. All morality was on a par with such ideals of the exalted virtues like justice, and brides were auctioned off by their fathers to the highest bidder and all human action was in keeping with such dark days of superstition and delusion.

The behavior of the judge of the time of Cnut, in England, when he was liable to be fined and removed for entering “a false judgment,” was in strict accord with the low standards of justice then obtaining and from this degraded position of the judiciary, to that of the exalted notion of an absolutely independent judiciary, there was the same difference in the quality of justice administered, that obtained between the generally ignorant men selected to parcel out the right, for remuneration, in those dark days and the pure and scholarly jurists, who, for centuries have made the administration of the law, in England, the admiration of the civilized world. The history of the judiciary, in England, has certainly demonstrated the wisdom of an independent judiciary, for no country pays the same high regard to the majesty of the law and in none are the correct ideals in legal standards more nearly approximated, than in England.⁷¹

⁷¹ It is a just source of pride to Englishmen that not a single lynching has occurred for three-quarters of a century, in a country governed by the English law.

Illustrative of the complete independence that for centuries has characterized the English judiciary, it is reported that when ac-

One does not have to become an Anglo-Maniac to feel a just pride in the stability and perfection of an institution, such as the English judiciary, for all who make law a rule of life, can but revere the approximation of an ideal where its reign is supreme.

In the consideration of this antiquated and condemned institution, known as "Judicial Recall," space has forbidden that we should do more than merely touch upon the centuries as mile-stones, in hurrying through the ages. From the facts of history presented, however, it seems strange that in the evolution of the race, amid the cultivated ideals of our twentieth century civilization, so many of our states would seemingly refuse to profit by the mistakes in the *Leges Barbarorum* of the dark ages; that they would apparently turn aside from the sad picture of the early struggle for law and—defying the axiom that we can but "judge the future by the past of man"—indulge the vain hope of utilizing the popular recall of judges as a panacea for all the social evils of modern times.

The patriot fathers, profiting by the accumulated wisdom of the past, builded an edifice in this free land of ours, bottomed upon the solid foundation of constitutional principles, sufficiently enduring to withstand the most tempestuous seas of partisan politics, because they profited by the record which history recorded of the stranded wrecks of states upon the shores of time.

costed by King James I. and asked how he expected to decide a given case, pending in his court, Sir Edward Coke, then Lord Chief Justice of England replied: "When that case shall come before me, I will decide it as a good judge ought to decide it, in accordance with the law and the evidence." *Percy's Anecdotes on Justice.*

Our fathers and their children have occupied this temple for over a century and we should have a care how we undermine the walls or remove the high priest of our liberties, with rough hands, from the sacred altar. Many a hearth-stone in this and future ages will need the protection guaranteed by the fundamental principle of government, which perpetuates the independence of the judicial department and the statesmen of the present age, without thinking of the permanence of their work, are making right and wrong for succeeding ages and by tampering with the institutions that time has approved, they may incur the everlasting condemnation of the citizens of succeeding commonwealths.

CHAPTER IV.

TRIAL BY BATTLE.

Trial by battle, sometimes called "wager of battel," or "battile," as Bouvier refers to it, could be claimed in appeals of felony and in certain civil cases and was of frequent use in affairs of chivalry and honor.¹

No tradition can tell us just when the trial by combat first came into existence.² Wager of battle was a natural accompaniment of the state of society existing when men were accustomed to take the law into their own hands and test the right by the might that could back it up. Battle has always been the law among the lower animals and in the evolution of the species, before society had developed the standards of our present civilization, the males of the human species, in barbarous nations, won the females much oftener through the law of battle, than by the display of intellectual attainments.

Trial by battle, therefore, may be traced to the most ancient period. Sacred writ gives an analogous contest, in the memorable battle between King David and Goliah, and the destinies of nations, instead of the rights of individuals, were made to depend upon the outcome of the combat. Goliah challenged the Israelites:

"Choose you a man for you, and let him come down to me. If he be able to fight with me and to kill me,

¹ Herbert's *Antiquities*, pp. 110, 130; Coke, *Lyttleton*, sec. 294.

² Neilson says: "Trial by combat came into existence—no tradition knows when." Neilson's "Trial by Combat," p. 1.

then will we be your servants; but if I prevail against him, and kill him, then shall ye be our servants and serve us.'"³

And, as the principals in the trial by battle always relied upon the grace of God to further the righteousness of their cause, so King David, in his battle, relied upon the God who had saved him from the lion and delivered him from the paw of the bear, to bring to a successful issue, his contest with the giant. He went to the fight in the name of the "Lord of Hosts," the God of the armies of Israel, and proclaimed that it was "His battle," and he fought not with sword and spear, but would deliver the Philistines into his hands.⁴

The soldier and historian, Paterculus, is authority for the statement that during the first half of the first century, when Quintilius Varus attempted the settlement of disputes among the Germans by law, he dis-

³ 1 Samuel, XVII., 8, 9.

⁴ The Mirror (C. 3, Par. 23) states that the trial by battle was allowable upon the warranty of the combat between the Shepard King of the Israelites and the Giant of the Phillistines, but Pope Nicholas I. quite seriously decides this precedent to be inconclusive. (Decret. Par. 2, Caus. 2, qu. 5, c. 22.)

The belief that the Deity would interfere on the side of the right, in these combats, originated with the institution itself, for we are told, that when King Gundobald, in the year 501, decreed the trial by battle as an antidote to perjury, he replied to the remonstrances of the churchmen by the argument that "The event both of national wars and private combat is directed by the judgment of God and Providence awards the victory to the juster cause." (II. Gibbon, ch. 38; *Esprit des Lois*, book 28, ch. 17; Neilson's *Trial by Combat*, p. 6.)

Neilson rejects the suggestion that trial by battle was divinely instituted when David, with his Sling, slew the mighty man of war of the Philistines, as did Pope Nicholas First, in the year 867. Neilson's "*Trial by Combat*," p. 2.

covered that their custom had been to decide all such controversies by single combat.⁵

Neilson⁶ refers to the traditional statement of King Frotho the Third in the misty age of Denmark, that he "deemed it much fitter to contend with weapons than with words," in the settlement of private disputes, and he shows how this sentiment found firm lodgment in the breast of the Norseman, whose supreme God was Odin, the God of war, for valor was the jewel of his soul.

Selden states that the decision of suits by appeal to the God of battle is said to have been invented by the Burgundi, one of the northern of the German clans that flourished before the subjugation of the Gauls by the Romans. And it is true, that the first written injunction of judiciary combats that we meet with is in the laws of Gundibald, A. D. 501, which are preserved in the Burgundian code. It was not a mere local custom of that particular tribe, however, but was the common usage of all those warlike people, from the earliest times.⁷

Judicial duels, or combats by individuals, according to forms of law, obtained among the ancient Goths, in Sweden,⁸ and this form of "searching out hidden truths," as Selden observes, was practiced by the Russians, Hungarians, Almaines and Normans.⁹

⁵ Velleius Paterculus, ii, ch. 117; Tacitus, *Germania*, ch. 10; Neilson, "Trial by Combat," p. 4.

⁶ Neilson, "Trial by Combat," p. 10.

⁷ Selden, on Duels, ch. 5; Herbert's "Antiquities of Inns of Court," pp. 109, 115; Bl Com.

⁸ Stiernh. de jure Sueon, I. l. c. 7.

⁹ Herbert's "Antiquities of Inns of Court," p. 109, 115.

History records that the Emperor Otho, A. D. 983, at Verona, held a diet at which were assembled many lords and princes from France, Germany and Italy and in order to discourage perjury in judicial trials, the convention substituted the trial by battle in all cases, in lieu of the oaths or testimony of witnesses.¹⁰

In the early feudal ages, "when knighthood was in flower," chivalry played no small part in the growth and development of the fixed rules governing the trial by battle.¹¹ Chivalry has always been in the world,

¹⁰ Henrion de Pansey, *Auth. Judic.* Introd. E. 3.

Some historians trace the origin of trial by battle to the fact that perjury became so prevalent that this procedure was resorted to to avoid the evil effects of this crime. (I. Pollock and Maitland's *History English Law*, p. 50.)

It is rather to be accounted for by the fact that it originated in the customs of a warlike race, where force and superstition were a part of the habits and customs of the people. (Lea. "Superstition and Force," 4 ed. p. 409.)

The Burgundian and Lombard rulers, in accordance with the natural fighting tendency of their subjects, were brought to recognize the trial by battle, because it combined the physical joy of battle with the higher ideals of an approved formal procedure, whereby the virtue known as justice was supposed to be attained. In other words, the trial by battle was the natural expression of the inclinations of both ruler and subject of the period when it was established and crept into the established procedure of the period, just as naturally as did the superstitions of the past centuries,—the belief in witchcraft and ghosts,—find expression along with the gems of literature of the same and a later period. The institution was a product of the barbarism of the time. And trial by battle was recognized as a form of ordeal which obtained among the warlike German tribes from very ancient times, but it was not practiced by the ancestors of the Anglo-Saxons. (I. Pollock and Maitland's *History English Law*, p. 51.)

¹¹ Neilson, in speaking of the effect of chivalry, upon the trial by battle, observed: "It reached its legal prime in the early feudal ages and enjoyed a new era of activity under the auspices of later chivalry." Neilson's "Trial by Combat." p. 1.

but it finds expression according to the customs obtaining in the different stages of man's growth and development. Because fighting was then the order of the day, in the olden times, knights were sacrificed by personal combat, for their ladies faire. When trial by battle was on the decline, Sir Walter Raleigh expressed the spirit of chivalry of that period, by spreading his cloak upon the ground for his queen to walk upon. And in this our twentieth century, with the progress of the race,—be it ever recorded to the credit of the manhood of the period—this same spirit was exemplified by the splendid lesson of hundreds of noble men heroically accepting the terrors of a mighty sea, in order to rescue the women and children from a sinking ship.¹²

The deeds of knighthood, in the England of the middle ages, came to be gauged according to fixed and settled rules and customs and finally the *Court of Honor*, was recognized, the same as the court of civil procedure, for the trial of affairs of honor, for, says Blackstone: "This court of chivalry, can order reparation at the point of honor."¹³

The proceedings of this court were by petition, in a summary manner, and the trial, instead of by a jury, as at the present day, with witnesses, was by individual combat.¹⁴

The *Court of Honor* was not a court of record and it could not imprison, but the marshalling of arms, was then the pride of the best families of the kingdom and

¹² This is *de hors* the subject at hand, but demonstrates that chivalry and heroism are still abroad in the land and that these virtues are confined to no particular class.

¹³ 3 Cooley's Bl. Com. 104; Coke, Litt. 261.

¹⁴ *Ante idem*.

the success in these affairs of honor, because of the spirit of chivalry of the times, was just as much guarded as was the attainment of justice through the procedure of the civil courts. Herald and knights seconded and backed up the appeals of the principals in such encounters and the sacrifice of the individual in these mortal combats was regarded as a trifle, compared to the preservation of the family name and honor and since his attainder and the corruption of his blood and family name depended upon his success in the combat, the wager of battle was welcomed, as the only vindication of one's manhood and honor.

The trial by battle, therefore, at a very early day, proceeded according to fixed, settled rules of law and was a recognized mode of legal procedure, just as much as was the trial by judicial proceedings. In this it differed from duelling, in that the latter was the fighting of two persons, at an appointed time and place, in the absence of law and order. In other words, the trial by battle was a mode of legal procedure, while duelling was a crime, in that the duel was not conducted according to legal rules and precedents, but the participants took the law into their own hands.¹⁵

Trial by battle was introduced into England, among other Norman customs, by William the Conqueror. The right could only be claimed in three classes of cases, i. e., military, or in the court martial, or court of chivalry

¹⁵ Comyns Dig. 252.

Neilson states that private duels succeeded trial by battle, in the 16' and 17' centuries, but of course trial by battle was not abolished in England until the year 1819, and duelling had continued for several centuries then. (Neilson's "Trial by Combat," pp. 18, 328.)

or honor;¹⁶ criminal, or in appeals of felony,¹⁷ and civil, or upon issue joined in a writ of right, the last and most solemn decision of real property.¹⁸ The reason why battle was allowed in "writs of right," was said to be on account of the inability of establishing one's title by action at law, in case of the death of witnesses or the absence of other evidence.

In the criminal practice the one exercising the right to wager of battle was called the "Appellee," from the French word "Appeller," meaning "to call," the term being used because of the practice of calling the parties before the court.¹⁹

¹⁶ Coke, Litt. 261.

¹⁷ 2 Hawk. P. C. c. 45.

¹⁸ Neilson's "Trial by Combat," p. 40.

¹⁹ Coke, III. Inst. 157; I. Russell, Crimes, 495.

That Trial by Battle was introduced into England by the Normans, is now quite generally conceded. "One ordeal the Normans recognized which had no place in English law, namely, the ordeal of battle." I. Pollock and Maitland's History Eng. Law, p. 74.

We find that William of Normandy, with his studious desire to preserve English institutions and protect Englishmen, in defining the procedure which should obtain if a Frenchman accused an Englishman, or *vice versa*, provided that the Englishman whom a Frenchman accused had the choice between battle and ordeal, but if the Englishman accused the Frenchman, the former had the right to compel the latter to join battle, or otherwise the Frenchman could swear away the charge, with oath helpers, according to Norman law. The Englishman was thus recognized as the Norman's peer, but as he was not accustomed to the ordeal by battle, he was given the choice of this procedure, if he preferred to avail himself of it, and the Norman, by a strict rule of justice, was required to purge himself, even though the Englishman would not fight. (Laws of William, c. 6; Forschungen, 328; I. Pollock and Maitland's History English Law, pp. 89, 90.)

For reference to the trial by battle, during the reigns of William I. to Henry II., see, I. Reeve's History English Law, pp. 329, 331, and note citing the Mirror.

The points of difference between a trial by combat, under the writ of right and one for treason, are noted by Neilson, in his "Trial by Combat" and principal among them are, that the trial at law could be fought before any judge, while the trial for treason had to be before the King, Constable or Marshal, or a special deputy; the forms of oath were different; the duel at law was fought on foot, while for treason, it was fought on horse-back; the weapon of the trial at law, was the baton, while that for treason, was the sword and spear; the position of the combatants, in a writ of right, was north and south, while in a trial for treason, it was east and west, and in the battle under a writ of right, since the trial itself was the judgment, there was no right to stop the trial, but in a trial for treason, the king, or his representatives could stop the trial, if he so desired.²⁰

In the appeal of felony, the prosecutor was bound to offer combat with his own body, but in the writ of right, the demandant could either participate in his own behalf, or through the medium of his champions' services.²¹ But even in the Norman days, when battle was in vogue, "battle did not lie" unless there was a charge of crime and at least ten shillings' worth of property was in dispute.²² In civil cases, professional pugilists were commonly employed and perjury became so common that the form of the compurgator's oath was changed to prevent the wholesale commission

²⁰ Neilson's "Trial by Combat," pp. 188, 189.

²¹ II. Pollock and Maitland's History English Law, p. 632, Bracton, fol. 347.

²² Leg. Hen. 59, sec. 16.

of this crime.²³ The commonest cause of battles were those urged by an "approver," or convicted criminal, whose pardon was conditional upon his ridding the kingdom of some half dozen or more of his associates, by his "appeals." This custom, however, began to decline so rapidly, that in Bracton's day the annual average of battles did not exceed twenty.²⁴

The old books indicate that in appeals of felony, the custom was for the combatants to have their heads shaved, not to prevent the opponent from catching hold of the hair, but because it was an old religious custom.²⁵

²³ I. St. Westm. c. 41.

²⁴ Bracton, fol. 152, 153; Select Pl. Crown, pl. 109, 140, 190, 199.

²⁵ Neilson's "Trial by Combat," pp. 56, 57.

In the class of civil or criminal cases where the right of trial by battle obtained, when the plaintiff offered battle, the defendant was bound to accept the offer. Having offered to defend the charge preferred against him, in legal contemplation, he volunteered to defend it with his own body, or with the body of his freeman, "when and where the court shall consider that defend he ought." He then tendered his gage and pledges to the court that on the given day set, he would perform the task assigned to him. (Year Book, 21, 22, II. Edw. I, pp. 9, 167; II. Pollock and Maitland's History English Law, pp. 610, 611.)

The champion, originally, was a witness and it was as such that he intervened. In a plea for land, he testified to having seen the seisin and that either he or his father saw the claimant in the possession of the land. (Neilson's "Trial by Combat," p. 48.)

While hired champions were forbidden by the law, it became a very common practice and Neilson gives many such contracts in his interesting and thorough book, on "Trial by Combat," pp. 48, 54.

Maynard's Year Books, contain the history of many trials occurring during the reigns of Edward III. and Henry VI. The report of one such trial, in the year 1329, describes the champions as appearing with shaven heads, ungirt coats, bare legged and bare armed, tendering a glove, with a penny in each finger, to the judge, who afterwards offered the pennies on the altar of the nearest church, in order that "God might give the victory to him who was

In discussing the trial by combat, in finance, Neilson shows how, during the reign of Henry II, large sums were paid to crown officers, for the privilege of the duel; for refusal to fight, or absence, and for fines for wrongfully claiming the right to the duel, and the same thing was true in the reign of Richard I.²⁶

During the reign of Edward III the trial by battle was discouraged by the legislation of the period and trial by jury was encouraged. The right of trial by battle was taken away in the case of an appeal for breaking the king's prison, and the right was also denied to one "taken with the manner."²⁷ And during the reigns of Edward V. and Richard III, the trial by battle in criminal cases had become so obnoxious to the people of England that it came to be established that if a valid indictment was pending for the offense charged, the right of trial by battle was denied.²⁸

In the reign of Henry VI, Priscot, Chief Justice, and Needham, one of the Justices, held that in an appeal for treason, the battle could only be had before the constable and marshal.²⁹

in the right." (Maynard's Year Books, I. Henry VI., pp. 6, 7; *idem* 21 Henry VI., pp. 19, 20.)

As the pugilists of the present day, have managers, who conduct the combats between the champions for the wager of the ringside, so men of the thirteenth century kept pugilists for hire, whose services were quite generally used in these trials. One of these champions was Richard of Newnham, whose master, or manager, was William of Cookham (Note Book, pl. 185, 400, 551), whose expert services were much in demand about the year 1220.

²⁶ Neilson's "Trial by Combat," p. 40; Maddox, 71, 66, 311, 349, 379.

²⁷ III. Reeve's History English Law, p. 329.

²⁸ 22 Edward IV., 19; IV. Reeve's History English Law, p. 58.

²⁹ 37 Henry VI. 20; IV. Reeve's History English Law, p. 58.

Wager of battle had been but seldom invoked in actions of debt, and in the thirteenth century, it was no longer allowed in this class of actions.³⁰

A generation after the Norman conquest, Henry I, by Charter to the City of London,³¹ granted exemption from the trial by battle to citizens of London, or peers of the realm, in certain cases, and a woman, a priest, an infant, a man of sixty or over, or one maimed, lame, or blind, was entitled to refuse the wager of battle and insist upon a trial by jury.³²

In civil combat, upon issue joined in a writ of right, the tenant or defendant had to try the issue by combat, until the reign of Henry II, when the Grand Assize was provided for, and then he had his election either to try the issue by combat or by the jury trial, provided for by this king in this class of cases.

³⁰ II. Pollock and Maitland's History English Law, p. 214.

³¹ Herbert's "Antiquities of Inns of Court," p. 130.

³² Neilson's "Trial by Combat," p. 46.

Clergymen were exempted from the trial by battle and by 41 Edward III., an appellant, on entering the field of battle could avoid the fight, by praying his clergy. (Herbert's "Antiquities of the Inns of Court," 130.)

By the Charter of London, the following citizens were also exempted from trial by battle, *viz.*, *sexagenarii*, or men of three score years; *coecus*, or those blind by accident after issue joined. (*Ante idem.*)

The exemption granted by Henry I., by the Charter of London, was followed by many other similar exemptions. Newcastle-on-Tyne, Norwich, Oxford and Winchester, soon followed and almost every borough strove to procure like exemptions. (Stubbs' Charters, Thompson's English Mun. History.)

Mayhem was a good ground for exemption from trial by combat. Crown Pleas, No. 4, 9; Bracton, ii, 458, 468; Glanville, XIV., ch. I; Neilson's "Trial by Combat," 46.

Glanville,³³ who wrote during the reign of Henry II, after the tenant was given his election to try his writ of right either by combat, or by the Grand Assize, thus describes the procedure then obtaining under the rule of civil combat:

“Both parties being present in court, and the demandant claiming the land in question, the tenant may require the view thereof: but as to this, there is respite to be made, to the end it may be known, whether the defendant have not more land in that town than what is in question; and if he have not, then he shall not be allowed any respite; but if he have more, he shall; and likewise have assignation of another day; and, when he shall be so departed out of the court, at three reasonable essoins,³⁴ the defendant may recover anew; and the shireeve of the county wherein the land lieth shall have a writ directed to him to send freeholders of his county to view the land.

“Then, after three reasonable essoins, concomitating the view of the said land, and both demandant and tenant appearing again in court, the demandant setteth forth his claim in this manner: ‘I do challenge against T. H. half a knight’s fee, or two carucates of land in that town, as my right and inheritance; and whereof, my father, or grandfather, was seised in his demesne, as of fee, in the time of King Henry I, or after the first coronation of the King that now is, and whereof he hath taken the profits, to the value of 10s. at the least, viz., in corn sowed, and other commodities; and this I am ready to try by this my freeman N.; and if any mischance shall befall him, then by that other person who hath seen and heard this.’ Or thus,—‘And this I am

³³ Beames Glanville, pp. 36, 41; Herbert’s “Antiquities of the Inns of Court,” pp. 110, 115.

³⁴ An *essoins* is defined by Sir Edward Coke as an excuse, the term being taken from the French verb, *essonier*, or *exonier*. The term was introduced into England by the Normans. Note to Beames’s Glanville, p. 6.

ready to try by this my freeman, S. unto whom his father, on his death-bed enjoined, upon the duty wherein a son is obliged to a father, that if at any time he should hear of a suit for that land, he should adventure himself, by combat for it, as that which his father had seen and heard.'

"The claim and demand of the demandant being thus made, it shall be in the choice of the tenant, either to put himself upon trial for the same by *combat*, or to put himself upon the *great assize* of our lord, the king, and to require a recognition which of them hath most right in that land.

"And if he will defend it by *combat*, he is then obliged to defend the right of the demandant word to word as he sheweth it against him, either by himself or some other fitting person; but note, that after the *combate* shall be thereupon waged, it behoveth him who holdeth the land, to defend it by *combate*, and thenceforth not to put himself into the *great assize*; and, after the *combat* waged, he may again reasonably essoins himself thrice, as for his own person, and thrice for the person of his champion. All which essoins being made, as they rightly ought to be, it is necessary that, before the *combat* be begun, the plaintiff do appear in court, and have his champion there in readiness to fight; nor may he bring any other champion than one of those, upon whom he did put the trial of his cause; neither may he change another for him, after the first waging of the battle.

* * * * *

"And if the defender (i. e., the champion) shall happen to be vanquished, his lord shall lose the land by him claimed, with the profits and commodities thereof, at the time of the seisin found in that fee, and shall never after be heard in court again for the same; but whatsoever things shall be determined by combat in the court of our lord the king are to remain firm forever; and thereupon there shall be a precept directed to

the shireeve, that the victor shall have the land which was in dispute.

* * * * *

“This, if the demandant shall prevail in the combat; but if he be overthrown by the vanquishing of his champion, then the tenant shall be acquitted from his claim without recovery by the demandant.”³⁵

Selden describes the ceremony governing the civil combat, upon issue joined upon a writ of right,³⁶ as follows:

“A piece of ground is in due time set out of sixty feet square, enclosed with lists; and on one side, a court erected for the judges of the court of common pleas, who attend there in their scarlet robes; and also a bar is prepared for the learned serjeants at law. When the court sits, which ought to be by sun-rising, proclamation is made for the parties and their champions, who are introduced by two knights, and are in a coat of armour, with red sandals, bare-legged from the knee downward, bare-headed, and with bare arms to the elbows. The weapons allowed them are only *batons*, or staves of an ell long and a four-coronered leather target, so that death very seldom ensued this civil combat.

* * * * *

“When the champions, thus armed with batons, arrive within the lists or place of combat, the champion of the tenant then takes his adversary by the hand and makes oath that the tenements in dispute are not the right of the demandant; and the champion of the demandant then taking the other by the hand, swears in the same manner that they are; so that each champion is, or ought to be, thoroughly persuaded of the truth of the cause he fights for. Next an oath against sorcery

³⁵ Beames, Glanville, p. 41; Herbert's "Antiquities of Inns of Court," 115.

³⁶ Selden, impr. Duello, Lond. 1610; Herbert's "Antiquities of the Inns of Court," pp. 115, 117; Select Pleas of Crown, Pl. 87; II. Pollock and Maitland's History English Law, p. 634.

and enchantment is to be taken by both the champions in this or a similar form: 'Here this, ye justices, that I have this day, neither eat, drank, nor have upon me neither bone, stone, no grass nor any enchantment,

During the twelfth century, in controversies between the Lord paramount and the tenant as to the right to the possession of real estate, the duel or battle was a method of trial generally in vogue. In the reign of Henry II., while the tenant, in a writ of right, had his election to defend his title by duel, "as a royal benefit conferred on the nation, by the prince in his clemency, by the advice of his nobles, as an expedient whereby the lives and interests of his subjects might be preserved, and their property and rights enjoyed *without being any longer obliged to submit to the doubtful chance of the duel*," we find the institution of the *assize* guaranteed to the subjects by the king, and this constitution is perhaps the first guaranty of the trial by jury in the English law. (Glanv. lib. 2, c. 4, 5, 6; I. Reeve's History Eng. Law, pp. 393, 395.)

The proceeding for the recovery of land during the reign of Henry II. and preceding reigns, is not without interest. The claim of the demandant, or claimant, was based only upon evidence *de visu et auditu*, or by the proof furnished by his freeman, whose evidence was either as to what he had actually seen and knew, or upon what his father had told him, and had enjoined upon him, on his death-bed, by the faith that a son owed to a father, which he was to assert, if he ever heard of any plea being urged as to the land in controversy. (Glanv. lib. 2, c. 3.)

If the tenant elected to try the issue by the duel, or battle, he could not afterwards resort to the *assize*, but must meet the issue *de verbo in verbum*, as the demandant, or claimant had asserted his title. The demandant could not be his own champion, but the tenant could defend himself, either in person or by a champion, and after the customary *essoins*, the battle proceeded. If the champion of the demandant was conquered, the demandant lost his suit and the champion was never again a competent witness in a duel. If the champion of the tenant, or the tenant himself was conquered, he lost the land with all the fruits and produce on it, and he was never afterwards to be heard in a court of justice concerning the same. In other words, the final effect of a trial by battle was as conclusive as the judgment of a court of competent jurisdiction and furnished the basis for a good plea of *res adjudicata* in all subsequent controversies over the same land in the future, between the same parties. (Glanv. lib. 2. c. 4, 5; I. Reeve's History Eng. Law, p. 394.)

sorcery, or witchcraft, whereby the law of God may be abased, or the law of the devil exalted, so help me, God and his saints.'

"The battle is thus begun, and the combatants are bound to fight till the stars appear in the evening; and if the champion of the tenant can defend himself till the stars appear, the tenant shall prevail in his cause; for it is sufficient for him to maintain his ground, and make it a drawn battle, he being already in possession; but if victory declares itself for either party, for him is judgment finally given. This victory may arise from the death of either of the champions, which indeed, hath rarely happened, the whole ceremony, to say the truth, bearing a near resemblance to certain rural athletic diversions, which are probably derived from this original; or victory is obtained, if either champion proves *recreant*; that is, yields, and pronounces the horrible word of *craven*, a word of disgrace and obliquy rather than of any determinate meaning: but a horrible word it indeed is, to the vanquished champion, since, as a punishment to him, for forfeiting the land, of his principal, by pronouncing that shameful word, he is condemned as a recreant *amittere liberam legem*; that is, to become infamous, and not be accounted *liber et legalis homo* being supposed by the event to be proved fore-sworn, and therefore never to be put upon a jury, or admitted as a witness in any cause."

Combat in criminal cases was allowed, according to Selden³⁷ not only in cases of treason but

"For the trial of a particular objected misdeed, cognizable by the ordinary course of the common law;

Neilson complains because neither Glanville, Bracton, Britton, nor Fleta, describe the procedure governing the actual fighting of the duel in an English plea for land under a "writ of right." (Neilson's "Trial by Combat," p. 86.) The above description of such a combat, is deemed accurate, from sources consulted and for the authorities consulted, the reader is referred to Herbert's "Antiquities of the Inns of Courts," pp. 115, 117.

³⁷ Selden, Duello, impr. Lond. 1610; Mich. 6 R. I. ret. 3.

and of these the justices of the kings bench have the imposition; it is likewise permitted for the purgation of an offense against military honor, which the high court of chivalry is to marshal by the law of arms."

The military form of trial by combat, on a criminal charge was as follows:

"First a bill of challenge is, together with a gauntlet, delivered unto the court by the appellant. The defendant denieth the point of the bill, and excepteth the gauntlet.

"Then, if the appellant have no witnesses to prove the matter of his appeal, the marshal prefixes a day, within forty, for deraigning the combat, taking pledges of both parties, to appear at the day, and to do battle between sun-rising and sun-set.

"The place appointed for the combat is a hard and even ground, railed within certain lists, sixty feet in length and forty feet in breadth; and without the lists are certain counter-lists, without which the marshal's men come, as well to attend any extraordinary accident, within the lists, as to keep off the press of the people without.

"Their weapons are appointed, a glaive, a long sword, a short sword, and a dagger. At the day the appellant doth appear and come to the east gate of the lists, where he is admitted to enter by the marshal himself, together with his arms, weapons, victual and also his council with him; and then is brought to a certain place, within the lists, where he attends the coming of the defendant.

"The defendant, if he appear not, is called by three proclamations, made by the marshal of the king of heralds of that province wherein the battle is deraigned. The marshal's clerk doth enter into his register their coming, the time of their coming, and the manner, whether on horse-back or on foot; the fashion of their arms and their weapons; the colour of their horses and the like.

"The marshal doth measure their weapons; and then the marshal hath a clerk ready, who brings forth the

crucifix and a mass book, whereupon both the appellant and defendant do take their oaths.

“The bill of challenge of the appellant and the answer of the defendant, is read unto them by the marshal’s clerk; and then they take their oaths; First, that their appeal and defense is true; Second, that neither has advantage of other by weapon; Third, that either would do his best endeavour to vanquish his enemy.

“Then proclamation is made at every corner of the lists, for the clearing and voidance of the lists. Then the combatants, being ready, the constable and marshal, sitting at the king’s feet, pronounce these words, with a high voice: *‘Lesses les aller, lesses les aller, lesses les aller et faire leur devoir.’*

“In the fight, if either of the parties do give any sign of yielding; or if the king, being present, do cry *‘Hoe,’* the constable and the marshal do part them, and observe precisely who hath advantage or disadvantage, either of other at that instant; for if they should be awarded to fight again, they are to be put in the same posture as they were before. If the king take up the matter, they are brought honorably out of the lists, neither having precedency before the other. If the battle be performed, and one party be vanquished, then, in case of treason, the rails of the lists are broken down, and the party vanquished is drawn out at a horse-tail and carried presently to execution by the marshal.”³⁸

The older books abound in many illustrations where the appellee, when charged by a formal accusation, with some felony, claimed the wager of battle to establish his innocence.³⁹

Neilson refers to the single combat between Corbis and Orsus, fought in the presence of Scipio, for a prin-

³⁸ This is a quotation from an old manuscript book, belonging to Sir Edw. Windham, knight, Marshal of the Camp, to King Henry VIII. See, Herbert’s “Antiquities of the Inns of Court,” pp. 119, 131.

³⁹ Coke, Litt. 287; 4 Shars. Bl. Comm. 312, 318, and notes.

cipality in Spain.⁴⁰ And the traditional combat, in pre-historic Roman days, between the Horatti and the Cur-
iatti is also cited, to show that the institution of trial
by combat was not unknown to the Romans, at an early
day.⁴¹

Geoffrey of Monmouth, describes the battle between
King Arthur and Flollo, the Roman Tribune, at the
siege of Paris, to determine who would be the master
of the realm, and this realistic story of the battle, on
horses, with fixed lances and the interesting narration
of how King Arthur, after his horse was killed under
him, drove his sword through the helmet of Flollo and
cut his head in two, reads like some story from the
works of fiction.⁴²

Neilson notes⁴³ that in Mediaeval Germany, disputes
between men and women were settled by combat, for
chivalry does not seem to have penetrated into the war-
like confines of this sturdy nation, at this period, al-
though some notion of equalizing the contests between
the weaker combatant and the stronger, obtained. The
male was handicapped, in such contests, by placing
him in a tub, sunk waist deep in the ground, with one
hand tied behind his back. The woman was allowed a
paving stone, sewed in the end of the long sleeve of her
shift, or under garment and she was accorded the privi-
lege of manouvering around her antagonist, at will, un-
til she found a vulnerable point of attack.⁴⁴

⁴⁰ Neilson's "Trial by Combat," p. 3.

⁴¹ Livy, book I., ch. 24, book 28, ch. 21.

⁴² Geoffrey of Monmouth, lx, ch. II; Neilson's "Trial by Combat,"
p. 25.

⁴³ Neilson's "Trial by Combat," p. 8.

⁴⁴ If this procedure obtained today, it would have a wholesome
effect, in some of the disgraceful controversies in our divorce courts.

Perhaps the earliest reference to the trial by battle, among the adjudicated English cases, is that of Wulfstan vs. Walter, of which Lea reports that the witnesses who saw the trial stood ready to prove their assertions regarding it, by "oath and battle."⁴⁵

The mandate of the Conqueror's law, that the mutilated trunk, of the defendant, convicted of treason, by combat, should remain as an evidence of his crime, in order to deter others from this hated offense, was exemplified, in the year 1096, in the case of William of Eu,⁴⁶ who, after trial by combat, had his eyes torn out and thus bereft of his sight, was sadly left to wander alone and despised through the world, a living example of the vengeance of the Lord, for the offense that he had been convicted of, by this hap-hazard method.

The battle between Henry, Earl of Essex and Robert de Montford, in the year 1163, on an island in the Thames, near the Abbey, is well attested by the history of that period. The charge of treason was preferred in Parliament and the combat was adjudged, because of the alleged cowardice of the Earl of Essex, during the Welsh war of 1157, in precipitating a panic, during

⁴⁵ Lea, "Superstition and Force," (4 ed.) 120.

Thayer states that the earliest reference to the trial by battle in English adjudicated cases, is that of Bishop Wulfstan vs. Abbot Walter, in the year 1077. (Essays in Anglo-Saxon Law, 379; Bigelow's *Placita Anglo-Normanica*, 19; Brunner, *Schw.* 197, 400-1; Thayer's *Older Modes of Trial*, V. *Harvard Law Review*, 66; II. *Essays in Anglo-American Legal History*, 397.)

The history of cases of trial by battle that were preserved, in England, prior to Glanville's time, are to be found in Bigelow's *Placita Anglo-Normanica*.

⁴⁶ I. *Ancient Laws England*, 494; Neilson's "Trial by Combat," p. 59.

a decisive engagement in a narrow pass, by throwing down his banner and giving the alarm that the king had been slain. De Montford was victorious in the battle which followed and though Essex made a fierce attack upon him, his blows were warded off and the Earl was defeated and left for dead upon the field of battle. His body was given to the Monks of Reading, for burial and he was revived and allowed to become a Monk himself.⁴⁷

“Hobbe-the-Werwede,” an approver, much spoken of in the old books discussing trial by battle, in the fourth year of King Henry III defeated “Walter-in-the-Grove,” but Hobbe soon afterwards faced another opponent and like many of our modern puglists, went down to defeat, in his last battle.⁴⁸

On October 4', 1350, Sir John de Visconti fought Sir Thomas de la Marche, before King Edward III, within the bounds of the royal palace, at Westminster. Sir John had charged Sir Thomas with taking bribes from the infidel Turks and betraying the Christian army. The combatants were clad in armour, but their helmets were guarded, at the visor, with small bars of steel. Sir Thomas had taken the precaution to wear steel knuckles, with which he soon broke the bars of steel covering the visor of Sir John's helmet and thus having the advantage, he punished him so severely, by repeated blows in the face, that Sir John was compelled to yield. Because of the compliment paid to the English King, in fighting this duel in his presence, when

⁴⁷ Carlyle's "Past and Present," book II., ch. 14; Jocelin of Brekendon's Chronicle, p. 52; Nellson's "Trial by Combat," pp. 61, 62.

⁴⁸ Nellson's "Trial by Combat," pp. 43, 44.

Sir Thomas returned to France, he was tried by his brother, the King, upon the charge of treason, and beheaded.⁴⁹

The celebrated trial between the Dukes of Hereford and Norfolk, made immortal by Shakespeare, in his *Richard II*, occurred at Coventry, on September 16', 1398. Hereford appealed the Duke of Norfolk of high treason, in Parliament, in the use of words tending to the king's dishonor. Armour and coats of mail had been procured from Germany and Milan, for the warriors. Hereford, who was the people's favorite, came to the lists mounted on a white horse, barbed with blue and green velvet. Norfolk's horse was draped with crimson velvet. Ten thousand armed knights were in attendance, to prevent an affray and a large concourse of the populace attended, to cheer their respective favorites. When the combatants faced each other, the King, fearful, no doubt, that Hereford would prevail, banished both the combatants. Norfolk soon afterwards died, in Venice, but Hereford returned the following year to wrest the crown from the weak king and proclaim himself King Henry IV.⁵⁰

A lawyer entered the lists, in the year 1431, when John Upton, a notary, accused John Downe of treason, in attempting to accomplish the death of the king. The duel was fought in the presence of the king, on the 24' of January and the writ, providing for the barriers and the making of the lists; the levelling and sanding of the

⁴⁹ Galfridus le Baker, 208, 210; Walsingham, i, 275; Myrick, ii, 32; Neilson's "Trial by Combat," pp. 168, 170.

⁵⁰ Hall, 4; Adam of Usk, 131; Trekolowe, 225; Neilson's "Trial by Combat," pp. 190, 193.

ground and the removal of the stones, is fully set forth in Coke, on Littleton.⁵¹ There was a fierce fight, but the king pardoned both contestants, before the final termination of the trial.⁵²

The battle between the armourer's servant, John Davy and his master, William Catur, described by Shakespeare, in the second part of Henry VI, was actually fought, on January 31', 1447. The armourer's body was stripped of its armour and left upon the field of battle and the penalty of treason was inflicted, and the trunk was mutilated and the head set up on the London Bridge.⁵³

The case of Thomas Whithorn, in the year 1455, reported by William Gregory, Mayor of London, is not without interest. Whithorn was a convicted thief and in accordance with the custom of the period, to save his own life, he made a number of appeals against reputable citizens, some of whom, because of his physical prowess, were unable to stand up against him and were hanged, after unsuccessful trials by battle, with him. He finally charged crime against one James Fisher, who, to save his life, concluded to fight the thief. Both contestants were clad in white sheep's leather, over their legs, head, face, hands and bodies and they fought with green ash staves, three feet long, with an iron ram's horn on the end. Fisher broke his weapon early in the fight and the constable then took the approver's away too and after that they fought "teeth and nail."

⁵¹ IV. Coke, Littleton, ed. 1817, ch. 17.

⁵² John Stowe's Survey, iii, 239, 371; Neilson's "Trial by Combat," 199.

⁵³ Gregory, 187; Nichols' "Illustrations of Manners," (1797) p. 217; John Stowe, 385; Neilson's "Trial by Combat," p. 201.

Fisher finally got the thief's nose between his teeth and his thumbs in his eyes and he so tortured him that he cried "craven" and was hanged, "for he was fals unto God and unto hym."⁵⁴

One of the last battles judicially fought upon English soil was that between Sir James Parker and Sir Hugh Vaughan, before Henry VII, in 1492. The battle was the result of a quarrel about certain arms given by the King to Vaughan. The fight occurred at Richmond and resulted in the victory of Vaughan over Parker. The former's spear penetrated the helmet of Sir James and cleaved his tongue from his mouth and he died in a short time from the wound inflicted.⁵⁵

The last trial by battle that was waged in the court of common pleas at Westminster,⁵⁶ occurred in the thirteenth year of Queen Elizabeth, A. D. 1571. This was the celebrated case of Lowe vs. Paramour, reported by Sir James Dyer⁵⁷ and also by Sir Henry Spelman,⁵⁸ who was himself a witness of the trial. The battle occurred in Tothill-fields, Westminster, "*non sine magna juris consultorum perturbatione*," reports Sir Henry Spelman.⁵⁹

In the last English case wherein the right of trial by battle was recognized, two citizens of the laboring class elected to decide their cause by the wager of battle, in

⁵⁴ Gregory, 199, 200; Neilson's "Trial by Combat," pp. 154, 157.

⁵⁵ John Stowe, 475; Neilson's "Trial by Combat," pp. 203, 204.

⁵⁶ Afterwards a battle occurred in the court of chivalry, in 1631. (Rushw. Coll. vol. II., part 2, fol. 112; 19 Rym. 322.) And another in the county palatine of Durham, in 1638. (Cro. Car. 512.)

⁵⁷ Dyer, 301.

⁵⁸ Spelman's Gloss (*sub voc.* Campus, 1625), 102.

⁵⁹ *Ante idem.*

1818. The case was that of Ashford vs. Thornton.⁶⁰ The facts giving rise to the appeal by Abraham Thornton, in 1817, are briefly told. Mary Ashford, of Warwickshire, was drowned, under circumstances directing suspicion of foul play, against Thornton. He was arrested for her murder and tried and acquitted by a jury, but public sentiment was so aroused against him that the dead girl's brother, instituted an appeal for murder against Thornton, and while this proceeding, after a jury trial, was quite unusual, the court held that the proceeding was proper. Thornton demanded the right of trial by battle, and the court held that he was entitled to such a trial, but before the trial, in April, 1818, the appeal was withdrawn and Thornton was discharged. Upon the legality of the proceeding of trial by battle, however, the case proceeded to judgment, before the Court of King's Bench and Lord Ellenborough, for the court, decided that:

“The general law of the land is in favor of the wager of battle and it is our duty to pronounce the law as it is and not as we may wish it to be; whatever prejudice, therefore, may justly exist against this mode of trial, still, as it is the law of the land, the court must pronounce judgment for it.”

That this judgment was right, few, if any, lawyers would question, as the repeal of existing laws is a legislative, not a judicial function; it is the province of the courts to expound and apply, not to repeal laws regularly enacted and recognized by the legislative branch of government and although an absurd law may remain unenforced, because over-looked, it is none the

⁶⁰ I. Barn. & Ald. 405.

less a law, although not enforced, until repealed by the proper department.

It was the judgment of the court, in the above case, however, that brought about the repeal of the right of trial by battle, in England, by the 59' George III, c. 46.⁶¹ By this statute it was enacted that:

“Appeals of murder, treason, felony and other offenses, and the manner of proceeding therein, have been found to be oppressive; and the *trial by battle*, in any suit, is a mode of trial unfit to be used; and it is expedient that the same should be wholly abolished.”

Accordingly, the act proceeded to abolish all appeals, in criminal cases and,

“In any writ of right now depending, or hereafter to be brought, the tenant shall not be received to wage battle, nor shall issue be joined, or trial be had by battle in any writ of right.”

Trial by battle was abolished in France, in 1260, by the good Saint Louis, for the reason that it often happened that in the contests between a rich man and a poor man, the former hired all the champions, and left the latter without help.⁶² The right to a trial by battle was last recognized, in Scotland, near the close of the sixteenth century,⁶³ so it survived in England, after it

⁶¹ I. Barn. & Ald. 405; 3 Shars. Bl. Comm. 339; 4 *idem*. 347.

⁶² *Grandes Chroniques de France*, M. Paulin, Paris, vol. IV., pp. 427, 430; Brunner, Schw. 297; “Older Modes of Trials,” by Thayer, V. Harvard Law Rev., p. 67; II. Essays in Anglo-American Legal History, note, p. 398.

⁶³ Stephens' History Criminal Law, in England; Neilson's “Trial by Combat,” p. 319.

The reader, interested in following the many illustrations of the trial by combat, in individual instances occurring at various periods during the centuries from 1100 to 1600, in Scotland, will find copious references to such trials, in Neilson's “Trial by Combat.”

had long ceased to exist, as a mode of judicial proceeding, in the other European countries.

Trial by battle has ever been an interesting theme in English literature. And it is little wonder that this sturdy struggle for justice, according to the light then obtaining, should be selected as the climax of the vivid plots, by the masters of poesy and fiction, depicting the chivalry of the age "when knighthood was in flower."

If human interest were lacking in this antique procedure of the past as we read of it in the unadorned details of the trials of the period, certainly no one can fail to entertain the deepest concern for the fate of the principals we meet with in this struggle for justice, as portrayed by the poets and novelists of English literature. And instead of being overdrawn, such representations are often but true portrayals of many of the concrete cases that have come down to us, of the trials by battle, of the past centuries.

The song of Roland, chanted at the battle of Hastings, in the eleventh century, was really attuned to the theme of wager by battle, and from the appeal, to the conclusion of the duel, between Pinabel and Thierry, before Charles the Great, resulting in the punishment of the treason of Ganelon, for the fall of Roland, the legal procedure of wager by battle of chivalry is truthfully presented, even as the law writers of the period would reproduce the history of such a trial.

Chaucer, in his pure and antique style, uses the trial by battle as the expression of the chivalry and knight-hood shown by Palamon and Arcite, in their battle with their hundred chosen warriors, before Theseus, for the

love of the beautiful Emelye, and accurately portrays the different points of law, governing the trial by battle, in his description of this combat, from the assembling of the knights,

"Armed for lystes, up at alle rightes,
All redy to derryayne hire by bataylle,"

to the final conclusion of the trial, by the conquering of Palamon and his knights.⁶⁴

That the immortal Shakespeare was familiar with the exact details of the procedure in trials by battle, is apparent from a perusal of the various plays where he introduces this method of trial.⁶⁵

In King Richard II., Thomas Mowbray and Bolingbroke, as "accuser and accused," are introduced, in all of their habiliments of war, into the presence of the king, "face to face, and frowning, brow to brow."⁶⁶

In the same play, a Lord offers the gage to the Duke of Aumerle, in the following challenge:

"*Lord.* From sun to sun, there is my honor's pawn;
Engage it to the trial, if thou dar'st."⁶⁷

The Duke of Surrey, is likewise made to offer battle,

⁶⁴For full explanation of the different legal phases presented in this poem, see, Neilson's "Trial by Combat," pp. 180, 188.

⁶⁵See White's "Law in Shakespeare," for full discussion of this and other scenes on "Trial by battle," as used by Shakespeare.

⁶⁶King Richard II., Act, I, scenes I. and III.

⁶⁷King Richard II., Act. IV., Scene, I.

The dramatic quarrel between Henry, earl of Hereford (afterward King Henry IV.) and the Duke of Norfolk, presented by Shakespeare in his play, Richard II., is described by a graphic writer in Herbert's "Antiquities," pp. 145, 146.

in Richard II, to Lord Fitzwater, in the following words:

“*Surrey*. In proof whereof, there is my honor’s pawn,
Engage it to the trial, if thou dar’st.”⁶⁸

Vernon and Bassett implore the right of trial by battle, in I’ Henry VI,⁶⁹ and the details of the trial by battle between the master, Horner, and his apprentice, Peter, are set forth, with precision, in II Henry VI, much as the details are given in the case from which this scene is actually taken by the Poet.⁷⁰

Edgar and his bastard brother, Edmund, are made to try their cause by the wage of battle, in King Lear, and the rule of Knighthood, then obtaining, is adverted to, giving the challenged one the right to decline the combat, if the right were not equal and the wronged Edgar truthfully asserts “Yet am I noble as the adversary, I came to cope withal.”⁷¹

Sir Walter Scott has added the zest of human interest, commonly felt for the innocent, wrongfully accused, to the uncertain fate of the gentle and lovely Rebecca, falsely accused of sorcery and witchcraft, by the valiant and fearless, but selfish, amorous and vacillating Brian de Bois-Guilbert, in *Ivanhoe*, and the trial by battle is utilized as the instrument of justice whereby the innocence of this gentle Jewess is established.

True to the faith of her fathers, and charitable, out

⁶⁸ King Richard II., Act IV., Scene, I.

⁶⁹ Act IV., Scene, I.

⁷⁰ Act I., Scene, III., and Act II., Scene, III.

⁷¹ King Lear, Act V., Scene, III.

For exposition of the above portions of Shakespeare’s plays, dealing with “Trial by Battle,” see, White’s “Law in Shakespeare,” Sec. 191, pp. 229, 232.

of the goodness of her heart, Rebecca ministers to the wants of the peasant and then, because she turns a deaf ear to the importunities of the faithless Templar, she is arraigned and tried for sorcery and the practice of witchcraft, and would have been left without a champion, but for the chivalrous conduct of Wilfred of Ivanhoe, who, though sick and maimed, placed his implicit faith in the righteousness of his cause and the assistance of Divine aid, and the wicked de Bois-Guilbert is stricken by a power from on high, because he fought upon the side of an unrighteous cause.

From the time that Rebecca offers the gage of battle, until the close of this interesting trial, by her tardy champion, who hazarded his life in her defense, against such fearful odds, in the tilt-yard of Temple siowe, we can but see that the author of this humanly interesting story had accurately studied the details of these trials by battle, as given in the older books.

After the evidence of the witnesses to her sorcery, had been taken, the accused demanded her right of trial by battle, through the service of a champion, in "respect of lawful essoine of her body." The author uses the exact words, given by Glanville, whereby she invokes the preliminary delay to prepare for trial. The herald opened the court and made announcement of the pending issues, in the usual manner; the court was regularly adjourned to a day certain for the trial. On the appointed day, the details of the trial are presented, just as such trials obtained in the courts of chivalry and honour of the period depicted. The accused, in the presence of the court, was interrogated, from her black chair, placed near the funeral pile, as to her readiness

for the combat. She begged the indulgence, which the law granted to her, of a short delay, after invoking the aid of Divine wisdom, for her deliverance. Her champion appears in true knightly fashion at the last moment and after gaining the recognition of the court, and permission to do battle for his fair principal, he throws the customary words of defiance into the very teeth of the false Bois-Guilbert and the battle proceeds, until the death of Bois-Guilbert, pronounced by the Court, in accordance with the superstition of the times, as a consummation devoutly to be wished, because it was, in fact, "the judgment of God."

In "The Fair Maid of Perth," Scott also describes the trial by battle as used to decide the destinies of the Clan Quhele and the Clan Chattan, assisted by the volunteer Henry Wynd, upon the field of North Inch, whereat the whole tribe of the Clan Quhele was annihilated in the combat with the race of the "Cat-a-Mountain."⁷²

Thackeray had also studied the procedure of trial by battle, for he introduces it into his plot in his realistic story of "Henry Esmond" and Crockett, in his "Black Douglas," makes the Earl William and James Douglas, of Avondale, enter into a legal trial by battle, just as the law of Scotland in the fifteenth century governed such trials.

But it is not the purpose of this chapter to treat extensively of trials by battle, as presented in the litera-

⁷² The combat between the Clan Chattan and Clan Kay, on the Inch of Perth, made memorable by this great novelist, actually occurred in the year 1396. (Neilson's "Trial by Combat," 239; 244 250; Bower, xv, ch. 3.)

ture of England, but only to trace the rise, growth and decay of this mediaeval institution, as evidenced by the law writers of the past and illustrated by the works of poetry and fiction, portraying this ancient mode of trial, which was superceded by the fairer method of jury trial and with the other barbarous customs of the dark, misty past, has faded away, with the generations that have crept to rest, before the dawn of our modern jurisprudence.

CHAPTER V.

TRIAL BY ORDEAL.

Trial by ordeal was the method used to ascertain the guilt or innocence of a person accused of crime, according to his ability to perform certain acts, or accomplish results which would, in the ordinary course of events, be hurtful to him.¹

If the suspected criminal was injured or killed in the performance of the act required of him, he was adjudged guilty, but if he performed the part assigned to him without injury, he was declared innocent. The tests that the suspected person was subjected to were called ordeals,² or judgments of God.

The custom of referring disputed questions such as the guilt or innocence of a person accused of crime, to the judgment of God, to be determined either by lot, or the success of certain dangerous experiments, has existed, from the earliest times, among various widely separated nations and peoples.³

We find that according to the "law of jealousies," laid down in the Mosaic code Fifteen hundred years before Christ, the guilt of a woman, accused of infidelity, by her husband, was determined according to this trial of ordeal, for it is recorded:

"And the spirit of jealousy come upon him, and he be jealous of his wife, and she be defiled; or if the

¹ Pattetta, *Ordalia*, c. I.

² From the Anglo-Saxon, *Ordaal*, or primitive, and *daal*, judgment, meaning "primitive judgment," or *urtheil*, according to the German.

³ Thayer says: "Nothing is older," *Harvard Law Review*, Vol. V., p. 63; II. *Essays in Anglo-American Legal History*, 392.

spirit of jealousy come upon him and he be jealous of his wife, and she be not defiled; then shall the man bring his wife unto the priest.

* * * * *

And the priest shall charge her by an oath, and say unto the woman, If no man have lain with thee, and if thou hast not gone aside to uncleanness; with another, instead of thy husband, be thou free from this bitter water, that causeth the curse:

* * * * *

And he shall cause the woman to drink the bitter water that causeth the curse; and the water that causeth the curse shall enter into her, and become bitter.

* * * * *

And when he hath made her to drink the water, then it shall come to pass that, if she be defiled, and have done trespass against her husband, that the water that causeth the curse shall enter into her and become bitter, and her belly shall swell and her thigh shall rot; and the woman shall be a curse among her people.

And if the woman be not defiled, but be clean, then shall she be free, and shall conceive seed.'"⁴

Compurgation of accused persons, by fire, existed among the ancient Greeks,⁵ and the Hindus practiced

⁴ Numbers, V., 14, 15, 19, 24, 27, 28.

This same ordeal is in use among the Africans, of the Gold Coast, to determine incontinence on the part of a woman.

From Herodotus it would seem that the ancient Egyptians believed in ordeals, with other divine power, to solve the guilt of prisoners, in cases where the evidence was doubtful, as he narrates instances where Aames II. who led a dissolute life, was convicted on the supposed divine judgment of the oracle. Herodotus II., 174.

In their excellent history of English Law, Pollock and Maitland say, of the trial by ordeal: "The history of ordeals is a long chapter in the history of mankind; we must not attempt to tell it. Men of many, if not all races, have carried the red-hot iron or performed some similar feat, in proof of their innocence." (Vol. II., p. 598.)

⁵ Sophocles' *Antigone*, 264; Aeschyles, fr. 284.

ordeal in nine different ways,—by the balance, by fire, by water, by poison, by the *cosha*, or drinking water, in which the images of the sun and other deities had been washed, by chewing rice, by hot oil, by red hot iron, and by drawing two images out of a jar, into which they had been thrown.⁶

The most generally used ordeals throughout ancient Europe were: Trial by battle, in which the vanquished one was adjudged guilty; trial by the ordeal of fire; trial by water; trial by the corsned; the trial of the eucharist; the trial by the cross and the test by judgment of the bier.

In trial by battle, the accuser and accused fought in mortal combat to determine the guilt or innocence of the suspected person.⁷ In the trial by fire, the accused walked bare-footed, over red hot plow-shares, or coals of fire,⁸ carried a red hot iron in his hand, or walked through flames, clad in a suit of wax, spread over woolen cloth, known as the "trial of the waxen shirt," because if he was unhurt by the fire and the wax was unmelted, he was considered innocent, but otherwise was adjudged guilty.⁹

The trial by water was either by cold or boiling water. If the former, which was the test usually applied to witches, the guilt was determined by the ability of the accused to float or sink, when cast into the water.¹⁰ Where the ordeal by boiling water was used, the accused had to take a stone out of boiling water, by

⁶ Asiatic Researches, vol. i, p. 389.

⁷ Neilson's "Trial by Combat."

⁸ Thayer's "Older Modes of Trial," II. Essays in Anglo-American Legal History, p. 393.

⁹ Pattetta, Ordellie.

¹⁰ Mackay's Delusions; Athelstane.

inserting his hand into a caldron, containing boiling water, as deep as his wrist, and if the triple ordeal was used, the boiling water was deepened so that he had to insert his arm as far as the elbow to get the stone.¹¹

In the *offa execrata*, or corsned ordeal, a priest put the corsned or hallowed cheese and bread, in the mouth of the accused, with various chants and imprecations and if he swallowed it, he was freed from the judgment, but if it stuck in his throat, he was held to be proven guilty of the offense with which he was charged.¹²

The test of the eucharist was chiefly applied among the monks and clergy, for it was believed that when they took the test, God would smite the guilty, with sickness or death.¹³

In the ordeal of the cross, the accuser and accused were placed under the cross, with their arms extended, and the one whose hands moved first was adjudged to be the guilty one and the other the innocent. A trial by lot, similar to this latter ordeal, occurred when the accused was placed before certain relics with two dice before him, one of which was marked with a cross. If the cross was selected, at hazard, he was acquitted, but otherwise was adjudged guilty.¹⁴

¹¹ Pattetta, Ordalie.

In Sophocles' *Antigone*, the guards protest their innocence to Creon, of any complicity in the burial of Polynices and offer to establish their innocence by ordeal, in the following lines:

"Ready with hands to bear the red-hot iron,
To pass through fire, and by the gods to swear
That we nor did the deed, nor do we know
Who counselled it, or who performed it." (PP. 264-267.)

¹² Pattetta, Ordalie; I. Reeve's *History English Law*, p. 203.

¹³ *Ante idem*.

¹⁴ Mackay's "Memoirs of Delusions."

And finally, the ordeal known as the judgment of the bier was used to determine the guilt of the accused, under a charge of murder. The deceased, supposed to have been murdered, was placed upon a bier, and the accused was made to touch his body. If blood flowed, or foam appeared in the mouth of the murdered person, or the body changed position, the accused was adjudged guilty of the murder, but if none of these signs appeared, he was acquitted.¹⁵

According to the Institute of Narada,¹⁶ the ordeal was used four or five centuries before Christ, in India, for we find that the balance, fire, water, poison and the sacred libation, were considered the five divine tests, for determining the guilt or innocence of suspected persons.

From the formulas given in the Institute of Narada, the most solemn ceremonies accompanied the application of the tests used in the trials by ordeal, in India, in ancient days. In describing the different tests, it is said:

“Having adjured the balance by imprecation, the judge should cause the accused to be placed in the balance again. ‘O balance, thou only knowest what mortals do not comprehend. This man, being arraigned

¹⁵ *Ante idem.*

¹⁶ According to Jolly, the translator of this book, the materials for the text date back many centuries before Christ and some of the old laws treated of, belong to the remotest antiquity, p. XX.

Rishi Narada was a celebrated Hindu Sage and Lawgiver, supposed to have been the son of Brahma and Saraswari. Mrs. Manning’s “Ancient and Med. India,” Vol. I., pp. 146, 249; Vol. II., pp. 119, 134.

The ordeal of the eucharist was based upon the statement of the Apostle, construed with pious veneration and accepted literally “he that eateth and drinketh unworthily eateth and drinketh damnation to himself.” *I. Corinthians*. XI, 28, 29; Lea, “Superstition and Force,” (3 ed.) 304.

in a cause, is weighed upon thee. Therefore mayst thou deliver him lawfully from his perplexity.' * * *

* If the individual increased in weight, he was adjudged guilty; if he was found to be lighter or equal in weight, his innocence was established.

In the ordeal of fire, the judge thus addressed the fire: 'Thou, O fire, dwellest in the interior of all creatures, like a witness. Thou only knowest what mortals do not comprehend. This man is arraigned in a cause and desires acquittal. Therefore, mayst thou deliver him lawfully from his perplexity.' * * * Seven circles of fire, with a diameter of a foot each and thirty-two inches distant from each other were marked on the ground, and the man, having fasted and cleansed himself, has seven *acvattha* leaves fastened on his hands and he takes a smooth ball of red hot iron in his hands and walks slowly through the seven circles of fire and deposits the ball on the ground. If he is burnt, he is adjudged guilty, but if he is unburnt, he is declared innocent.

In the ordeal of water, the judge adjures the water, as in the preceeding tests, by the balance and by fire, and the accused wades into water to his waist, while another shoots an arrow. The accused dives into the water and if he remains under while a swift runner returns the arrow, he is innocent, but otherwise is adjudged guilty.

In the poison ordeal, after the selection of the particular poison the judge thus adjures the poison: 'Thou, O poison, art the son of Brahma,¹⁷ thou are persistent in truth and justice; relieve this man from sin and by thy viture become an ambrosia to him. On account of thy venomous and dangerous nature, thou art the destruction of all living creatures; thou art destined to show the difference between right and wrong, like a witness.' The accused person eats the poison and if it easily digested, without violent symptoms, the king

¹⁷ Brahma, the first person, in the Triad, of the Hindus, was the god of the fates, master of life and death, the author of the Vedas and the great lawgiver and teacher of India.

shall recognize him as innocent, and dismiss him, after having honored him, with presents.

In the ordeal of sacred libation, the judge should give the accused water in which an image of that deity to whom he is devoted, has been bathed, thrice calling out the charge, with composure. One to whom any misfortune or calamity happens, within a week, or a fortnight, is proved to be guilty."¹⁸

Charlemagne apparently did not place much dependence in the *judicium Dei*, by means of the ordeal, at the beginning of his reign, for in 779, by his edict the trial by ordeal was to be used in the more trifling offenses, while cases of greater magnitude were to be tried by the civil law of the realm.¹⁹

Later on in his reign, however, by his edicts of the year 806 and 809 this monarch seems to have come to

¹⁸ Institute Narada, Pt. I., c. 5, sec. 102, to Pt. II., pp. 44, 45. According to an eminent authority, ordeals are still practiced in India, in private life. Sir Henry Maine's "Life and Speeches," p. 426; Manning's "Ancient and Mediaeval India," Vol. I., pp. 146, 249; Vol. II., pp. 119, 134.

From the fragments of the Avesta, which have come down to us, containing snatches of the prehistoric law of the ancient Persians, the ordeal of boiling water was a fixed, settled legal procedure, at that distant day, for it is there recorded:

"Creator: he who knowingly approaches the hot, golden, boiling water, as if speaking truth, but lying to Mithra;

What is the punishment for it?

Then answered Ahura-Mazda: Let them strike seven hundred blows with the horse goad, seven hundred with the craesho-charaha." This was the punishment affixed for using this particular ordeal for fraudulent purposes, just as if one trifled with one of the settled legal processes of the present day and as perjury was then prevalent, the punishment of twice seven hundred blows to the perjurer, was the penalty for using this ordeal to further perjury, or false swearing. Vendidad, Farg. IV., 156; "Records of the Past," VII., 109; Lea, "Superstition and Force," (3^d ed.) 233.

¹⁹ Cap. Car. Mag. ann. 779, sec. 10; Lea, "Superstition and Force," (3^d ed.) 348.

regard the ordeal with much greater favor, for he frequently referred to this method of trial; when dividing up his empire between his sons he directed that all disputes should be settled by ordeal, and endeavored to force a greater regard for the judgments in trials by ordeal, on the part of the subjects, whom, it seems, had come to entertain his own early distrust in this species of trials.²⁰

It seems that Charlemagne completely believed in the efficacy of the ordeal, by the year 794, for we are told that in this year, a certain Bishop Peter, who was condemned by the Synod of Frankfort to clear himself of the suspicion of complicity in a conspiracy of treason against Charlemagne, being unable to obtain conjurators, one of his vassals offered to attempt the test of the ordeal, as his proxy, and on his success, the Bishop was adjudged innocent of the charge and was reinstated.²¹

Soon after the death of Charlemagne, in the year 816, Louis-le-Debonnaire, at the Council of Aix-la-Chapelle, prohibited the continuance of the ordeal of the cross,²² because it had a tendency to bring the Christian symbol into contempt and his son, the Emperor Lothair also issued a similiar edict against the use of this ordeal, after he assumed the reigns of government.²³

Among the early Saxons, the ordeals by fire and

²⁰ Capit. iv ann. 803, secs. iii, vi; in L. Longobard, Lib. ii, Tit. xxviii, sec. 3; Tit. iv, sec. 25; Capit. Car. Mag. I., ann. 809, sec. 20.

²¹ Capit. Car. Mag. ann. 794, sec. 7; Lea, "Superstition and Force," p. 338.

²² Concil. Aquisgran. cap. xvii.

²³ L. Longobard, Lib. II., Tit. iv, sec. 32; Lea, "Superstition and Force," p. 298.

water were practiced, for we find that the *ordale* signified *judicium æquum, justum, indifferens*, "an upright, just and indifferent judgment."²⁴

Tacitus tells us that the ancestors of our Saxon forefathers, during pagan times, were addicted to divination and risked certain results upon the flying of birds, the neighing of horse and trial by combat.²⁵ And trial by ordeal was used by them in both civil and criminal cases, to determine the issues later solved by the testimony of witnesses, or the oaths of compurgators.²⁶

The ordeal of hot water appears in the laws of Ine,²⁷ who began his reign in the year 710, and the ordeals by fire and water had become so common by the time of King Athelstan, that we find the procedure governing such trial, fully covered by his Constitutions,²⁸ by which they were considered in the light of religious ceremonies:

"Concerning ordeal, we command, in the name of God, and by the precept of our archbishops and bishops, that no man enter into the church after the fire is brought in, wherewith the judgment is to be made hot, except the priest, and he who is to undergo the trial; and let there be measured nine feet from the stake unto the mark, according to the measure of the foot, who is to come thus to judgment.

And if the trial be by water, let it be made hot, till it boil, in a vessel of iron, brass, lead, or clay; and if it be single, let his hand be put therein after a stone or

²⁴ Herbert's *Antiquities* (1804), p. 146.

²⁵ *De Moribus Germanorum*, cap. X.

²⁶ Herbert's *Antiquities*, p. 147.

²⁷ *Ante idem*; I. Pollock and Maitland's *History English Law*, p. 39; Dr. Liebermann's *Sitzungsberichte der Berliner Akademie*, 1896, XXXV., p. 829.

²⁸ *Leg. Athelstan*, 23; I. Reeve's *History English Law*, p. 201; *Analecta Anglo-Brit. lib. ii*, cap. 8, *inter Leges Athelstan*, cap. xxx.

stock up to his wrist; but if the accusation be threefold, then to his elbow; and when the judgment shall be prepared, let two men be brought in on either side, to make experiment, that it be as hot as is afore expressed.

Let as many also come in on each side the judgment, along the church; and let them be fasting and abstain from their wives that night; and the priest shall sprinkle holy water on them, and give them the text of the holy gospel to kiss, as also the sign of the cross; and no man shall make the fire any longer than whilst the benediction beginneth, but shall cast the iron upon the coals until the last collect; afterwards it shall be put upon the *ceac* (cauldron)²⁹ without any more words, then that they pray earnestly to God that he will vouch safe to manifest the truth therein; then shall the person accused drink holy water and his hand wherewith he shall carry the judgment shall be sprinkled therewith; and so let him go, the nine feet measured being distinguished by three and three.

At the first mark next to the stake, he shall set his right foot and at the second his left foot; and thence he shall remove his right foot unto the third mark, where he shall throw down the iron and hasten to the holy altar; which done, his hand shall be sealed up, and the third day after viewed, whether it be clean or unclean where it was so sealed. And he who shall transgress these laws, let the ordeal judgment or trial be done upon him, that he pay 120 s. for a fine or mulct."³⁰

For three days before the trial, the accused was to attend the priest, to be constant at mass, to make his offering and in the interim, to sustain himself on nothing but bread, salt, water and onions. On the day of the trial he was to take the sacrament and swear he was not guilty of the crime imputed to him. The accuser and accused both came to the place of trial, with not

²⁹ Dr. Liebermann's *Sitzungsberichte der Berliner Akademie*, XXXV., 829; I. Pollock and Maitland's *History English Law*, p. 39, note.

³⁰ Herbert's *Antiquities* (1804), pp. 147, 148.

more than twelve persons each, to stay any interposition or violence and the accuser then renewed his charge upon oath and the accused made his purgation on oath also. If the ordeal was by hot water, he put his wrist or arm into the boiling water, accordingly whether it was the simple or triple test, and if the trial was by cold water, his thumbs were tied to his toes and he was cast into the water. If he escaped the boiling water unhurt, or sank in the cold water, he was adjudged innocent, but if he was burned by the hot water, or swam in the cold water, he was adjudged guilty, as charged by his accuser.³¹

These trials by water and fire were called *judicium Dei*, or, as the Mirror of Justice puts it, miracles of God, but "Christianity suffered not that they be by such wicked arts cleared, if one may otherwise avoid it."³²

From this observation in the Mirror, it has been contended that the Anglo-Saxons distinguished between open and manifest offenses and those not so public as to be susceptible of proof and that trial by ordeal was only used in the latter class of crimes.³³

It is true that in Alfred's time there were trials by jury, and it seems that trial by ordeal may have been re-established, after trial by jury, in doubtful cases, as a refuge or solution of an otherwise doughty problem for the barbarian mind to solve.³⁴

³¹ I. Reeve's History English Law, pp. 201, 202; Leges Athelstan, 23.

³² Mirror of Justice, c. 7, s. 24.

³³ I. Reeve's History English Law, p. 203.

³⁴ Finlason's note to I. Reeve's History English Law, p. 201.

Pollock, in his "Anglo-Saxon Law," says "A man of good repute could usually clear himself by oath, but circumstances of grave

Pursuance to the terms of a certain league, made between Edward the Elder and Guthrun, the Dane, ordeals were forbidden upon festivals or fasting days³⁵ and the same provision was inserted in the constitution made by the synod held at Eanham, under King Ethelred.³⁶

The laws of Canute and Edward the Confessor also contained provisions forbidding trials by ordeal upon festivals or fasting days, for we read that the *judicium Dei*, upon these auspicious occasions, was to be postponed, until the affairs of mortals could be better arranged for its reception, by the following provision:³⁷

“We forbid ordeals and oaths” (the name law trials at that time were called) “on feast days and ember days, and from the advent of our Lord till the eighth day after twelfth be past; and from Septuagesima till fifteen nights after Easter. And the sages have ordained that St. Edward’s day shall be festival all England on the fifteenth cal. of April, and St. Dunstan’s, on the fourteenth cal. of June; and that all Christians, as right it is, should keep them hallowed and in peace.”

In the simple ordeal, of the Anglo-Saxons, the hot iron weighed one pound and in the triple ordeal, it was to weigh three pounds. The triple ordeal was used in the crimes of arson and murder, treason and forgery.³⁸

In the laws of Edward the Elder, perhaps the earliest reference in Anglo-Saxon laws, to the ordeal, it was suspicion or previous bad character, would drive the defendant to stand his trial by ordeal.” I. Essays in Anglo-American Legal History, p. 93.

³⁵ Lamb. de priscis Angl. Leg. cap. 39.

³⁶ Herbert’s Antiquities (1804), p. 156.

³⁷ *Ante idem.*

³⁸ Leges, Aesthelstan, iv, sec. 6; Aetheldred, iii, sec. 7; Cnut, Secular. sec. 58; Lea, “Superstition and Force” (3 ed.), 253.

provided that perjured persons, or those once convicted should not thereafter be deemed oath-worthy, but on their accusation, should be hurried to the ordeal,³⁹ and similiar provisions are to be found in the laws of Ethelred, Cnut and Henry I.⁴⁰

Trial by ordeal at first carried with it the sanction of the priest, as well as the civil power and the clergy continued to approve and interject the spiritual portion of the proceeding, until the early portion of the thirteenth century.⁴¹ Under the law of William the Conqueror, the conduct of the ordeal, as a known ecclesiastical procedure, was declared to be the business of the bishop, but the civil and spiritual powers were to co-operate harmoniously, in the trial by ordeal, the court of the hundred making the original order by which a man was sent to the ordeal of fire or water, but the bishop presided at the ceremony and regulated the course of the proceeding, in accordance with the solemn religious ceremony, whereby the element used was blessed and the Divine Wisdom of Omnipotence was invoked to the conclusion of the whole proceeding.⁴²

The Normans were attached to the procedure, elsewhere discussed, as the *trial by battle* and they did not relish a procedure which seemed to them to be a mere superstitious formality, fit only for women and old or maimed men. However, ever since the reign of Ina,

³⁹ Legg. Edwardi, cap. iii; Lea, "Superstition and Force" (3 ed.) 340.

⁴⁰ Legg. Aethelredi, cap. i, sec. I; Cnuti Saecul. cap. xxii; Henrici, I., cap lxy, sec. 3; Lea, *supra*.

⁴¹ Schmid, Gesetze, p. 357; Stubbs, Select Charters; I. Pollock and Maitland's History English Law, p. 450.

⁴² *Ante idem*.

the Saxons had been accustomed to the ordeal and the laws of Ina and later monarchs continued in effect, and the accused person was entitled to select the ordeal of hot iron, or that of hot water and to undergo, under the supervision of the priest or bishop, a trial, to determine his guilt or innocence of the offense charged.⁴³

In the year 1166, in the Assize of Clarendon, and again in the year 1176, in the Assize of Northampton, Henry II provided for a public mode of accusation for the capital felonies and trial by ordeal was the method of procedure fixed to determine the guilt or innocence of the person charged.⁴⁴

Prior to the thirteenth century perjury was so common and it was so impossible to avoid the effects of a false oath, by the proceedings of men, that the Laws of Henry provided that "No one is to be convicted of a capital crime by testimony."⁴⁵ Mere human testimony was not enough to send a man to the gallows, but one accused of a capital offense was to be entitled to one of the old-world sacred processes, wherein the *judicium Dei*, was supposed to take the place of the false standards, too often erected by ordinary mortals. The ordeal was then so far "the law of the land" that one accused of a capital offense, who refused the ordeal, could be executed, as an outlaw, because he had thus defied the law of the realm. But one who had not been accorded this "law of the land," based upon the sacred

⁴³ LL. Inae, c. 77; *Traites sur les coutumes Anglo-Normand*. Tom. I., p. 577; Hale's *History Common Law*, p. 152.

⁴⁴ Thayer "Older Modes of Trial," V. *Harvard Law Review*, 64; II. *Essays in Anglo-American Legal History*, p. 394.

⁴⁵ *Leges Henrici*, 31, sec. 5; *Foedera*, i, 154; II. *Pollock and Maitland's History English Law*, p. 650.

and Divine belief in the infallibility of the test of ordeal, could not legally be condemned, as trial by jury or by the oaths of witnesses was not yet an accredited method of procedure in cases of capital offense.⁴⁶

Glanville tells us that in his time, about the year 1187, an accused person, who was so far disabled by mayhem that he could not test his guilt or innocence by the ordeal of battle, was entitled to the ordeal of fire or water, to determine his guilt or innocence, this author of the first law book observing:⁴⁷

“In such case, the Accused is obliged to purge himself by the Ordeal, that is, by the hot Iron, if he be a free Man—by water, if he be a Rustic.”

This corresponds with the statement elsewhere made, that in the early use of this trial, the hot iron ordeal, was confined to the nobility, or patricians, while the water ordeal was generally used among the common people, accused of minor offenses or other than the capital felonies.⁴⁸

By the latter part of the twelfth century, the ordeal had become so discredited, in the time of Henry II that the law of that reign provided that any one charged before the king's justices with the crime of murder, theft, robbery, or the receipt of such offenders, or of arson, or forgery, by the oaths of twelve knights of the hundred, or of twelve free and lawful men, in the ab-

⁴⁶ Palgrave, *Commonwealth*, p. 207; II. Pollock and Maitland's *History English Law*, p. 650.

⁴⁷ Glanville (Beame's tr.), p. 283.

⁴⁸ I. Reeve's *History English Law*, pp. 456, 457; *Mirror of Justice*, cap. III., sec. 23; Lea, "Superstition and Force," (3 ed.) 256.

"The water ordeals, both hot and cold, were stigmatized as plebian, from an early period, as the red-hot iron and the duel were patrician." Lea, 283.

sence of such knights, should submit to the water ordeal, and if he failed in the experiment, he should lose one foot; and this law afterwards amended, at Northampton in order to make the punishment more severe and the felon also lost his right hand, as well as one of his feet. He was also required to abjure the realm, within forty days and even though he was acquitted by the water ordeal, he was required to find pledges to answer for his good behavior, and if he were later charged with murder, or other felony, he was then required to abjure the realm within the forty days, with all his goods, save what his lord might distrain to discharge his obligations due him.⁴⁹ This law was to remain in effect, as long as the king pleased and the effect of this law was that the accused, if convicted, lost a limb and suffered banishment and even if acquitted, by ordeal, he was likewise banished, for such was the doubt then entertained as to the justness of the trial by ordeal.⁵⁰

This doubt upon the justness of the trial by ordeal, was due, in large measure to the fact that many such trials were fraudulently managed, by the Bishops, to bring about the acquittal of the accused.

It is related that William Rufus, who had caused fifty Englishmen of good family, to be tried by ordeal for the violation of some law of the realm, after their acquittal by the ordeal of the hot iron, declared that he would try them again by the judgment of his court and would not abide by this pretended judgment of God, "which was made favorable or unfavorable, at

⁴⁹ I. Reeve's History English Law, p. 456; I. Pollock and Maitland's History English Law, p. 152.

⁵⁰ *Ante idem.*

any man's pleasure."⁵¹ And Henry II, likewise convinced of the fraud accompanying such acquittals, by this means, also refused to give final effect to such acquittals.⁵²

Trial by ordeal continued in England until the judgments of councils, in the reign of Henry III, but in the third year of the reign of this monarch on January 27', 1219, direction was given to the justices itinerant for the northern counties of the kingdom not to try persons charged with murder, arson, robbery, theft or other felonies, by the ordeals of fire or water, but for the present, until further provision could be made, to keep them in prison, *so as not to endanger their life or limb*⁵³ and those charged with the inferior offenses were to be compelled to abjure the realm.⁵⁴

This order of council, during the reign of Henry III, had such a potent influence toward abolishing the superstitious trial of ordeal, that it went quite out of use by the time of Bracton, who makes no mention of it in his book.⁵⁵

⁵¹ I. Reeve's History English Law, p. 456.

⁵² Litt. Hen. II., vol. iv, 279; I. Reeve's History English Law, 457.

Instead of the *judicium Dei*, the success of the fifty men would look more like *judicium clericus*. Eadmer, Hist. Nov. 102; II. Pollock and Maitland History English Law, 599.

⁵³ This order to the justices, as we have seen, in the Essay on *Peine forte et dure*, had the effect of filling the jails of the kingdom with prisoners content to await the invention of some other method of trial than that of ordeal, and since none such was provided, to refuse to plead and thus baffle the king's justices. To overcome this custom, the order not to *endanger their lives or limbs*, soon gave place to the terrible torture, by which they were literally *pressed to death*, for standing mute.

⁵⁴ II. Reeve's History English Law, 286.

⁵⁵ II. Reeve's History English Law, 287, and note.

Compurgation by witnesses was substituted, in England in the early part of the thirteenth century, for the former mode of compurgation by ordeal and the latter became an obsolete procedure in England, until revived in the crime of witchcraft, by James I, where it was quite generally used, to determine the guilt or innocence of persons accused of sorcery, because of the absence of any other test to apply, to determine their guilt or innocence.⁵⁶ This superstitious monarch maintained that trial by ordeal was an infallible test in cases of witchcraft, because the pure elements of fire and water would not receive those who had renounced the sacred privileges of their baptism and by his authority and example thousands of cases of cruelty and oppression resulted, in the use of the ordeal, as applied to cases of sorcery, during the craze of that delusion, in Europe,⁵⁷ but otherwise, the trial by ordeal passed into history,

⁵⁶ Lea "Superstition and Force," (3 ed.) 291; *Daemenologiae*, Lib. III., cap. vi.

⁵⁷ *Ante idem*.

The Lateran Council of 1215 forbade the clergy to take part in the ceremony of the ordeal any further and in prompt obedience to this decree in England, Henry III. abolished it in the kingdom, as England was then at the Pope's feet, and aside from the cases of witchcraft and sorcery, in the reign of James I., the ordeal last appears, as a method of judicial trial, in the old rolls of the reign of King John. (Concil. Lateran. IV., c. 18; *Foedera*, i, 154; *Rolls of King's Court*, Pipe Roll Soc. 80, 86, 89;) *Select Pl. Cr*; *Note Book*, pl. 592; Lea, "Superstition and Force," (3 ed.) 421; II. *Pollock and Maitland's History English Law*, p. 599 and notes.

Lord Hale informs us: "That in all the time of King John * * * trial by ordeal continued, * * * but it seems to have ended with this king, for I do not find it in use any time after." (*History Common Law*, p. 152.)

In Nigeria the trial by ordeal still obtains in cases of witchcraft and to vindicate the chastity of women. P. Amaury Talbot's article, in *London Telegraph*, July, 1912.

along with the many other cruel institutions of a past age.

The ordeal was frequently used, in ancient Europe, to establish the paternity of children or the chastity of women, the success or failure of the test being generally accepted as the judgment of God.

In 887 Charles-le-Gros accused his wife, the Empress Richarda, of adultery with Bishop Liutward, and she offered to prove her innocence by the judicial combat, or the ordeal of the red-hot iron.⁵⁸

St. Cunigundi, referred to as the "virgin-wife" of the Emperor St. Henry II, is also reported to have eagerly appealed to the judgment of God, to establish her innocence of the baseless charge of infidelity, preferred against her by her jealous lord, and in vindication of her honor, to have successfully trod, unharmed, the red-hot plow-shares.⁵⁹

In the eleventh century, the unholy purpose of Edward the Confessor—who was himself too ascetic to make his own wife, Editha, the partner of his bed⁶⁰—in his desire to accomplish the death of his own Mother, Queen Emma, because of her partiality to his half brother, Hardicanute—the son of Canute,—was frustrated by the Queen invoking this judgment of God, through the ordeal of the red-hot iron, to establish her innocence of the charge of adultery with Alwyn, the Bishop of Winchester. The Queen triumphantly purged both herself and the Bishop, by the help of St.

⁵⁸ Regino. ann. 886—*Annales Metenses*; Lea, "Superstition and Force," (3 ed.) 257.

⁵⁹ Lea, "Superstition and Force," *supra*; S. Kunegundae, cap. 2; Ludewig Script. Rer. German. I., 346.

⁶⁰ Green's History English People, vol. I.

Sowthin, by walking bare-footed over nine red-hot plow-shares and out of gratitude for this vindication, the Queen and the Bishop each gave nine manors to the Church of Winchester in memory of the nine plow-shares, and it is reported that the King, for preferring the false charge against them, was corrected with stripes.⁶¹

The Confessor was more successful in ridding himself of his father-in-law, however, and the interesting case of Godwin, Duke of Kent, father of Harold and sometimes called the "King maker of England," during the reign of Edward the Confessor, also illustrates the superstitious belief in the corsned ordeal.

As the story goes, Duke Godwin was dining with his royal son-in-law Edward the Confessor—for the latter had then married his daughter Editha—and whether

⁶¹Freeman's *Norman Conq.* Vol. II; Rapin, *History d' Angleterre*, I., 123; Wm. of Malmesbury, Giles' note, ann. 1043; Lea, "Superstition and Force," (3 ed.) 258.

It seems that the charges against Queen Emma were preferred by Robert, Archbishop of Canterbury. She was accused both of consenting to the death of her son, Alfred, and of preparing poison for her son Edward, the Confessor, and also of intimacy with Alwyn, the Bishop of Winchester. The Dowager Queen, on the night preceding the trial, prayed for help, in the Abbey of St. Swithune, at Winchester and the next day she passed over the nine plow-shares unhurt. Archbishop Robert fled the kingdom and the King, who had brought about her trial, did penance for his credulity.

(The Percy Anecdotes, p. 161.)

The paternity of two children resulting from a morganitic marriage of Robert Curthose, son of William the Conqueror, is reported to have been established by the ordeal of the red-hot iron, which the mother carried unhurt, and Curthose, then Duke of Normandy, thus convinced of the legitimacy of the boys, regularly adopted them. (Roger de Wendover, Ann. 1085; Lea, "Superstition and Force," (3 ed.) 259.

premeditated or not, the King repeated the accusation that his brother Alfred had met his death at the hands of Duke Godwin. To vindicate himself old Godwin then invoked the ordeal of the corsned and seizing a morsel of bread he dramatically exclaimed: "May God cause this bread to choke me if I am guilty in thought or in deed of this crime." Then the King took the bread and blessed it, and, whether he poisoned it or not, when Godwin put it in his mouth and swallowed it, he was suffocated by it and fell down dead.⁶²

In this age of scepticism it is hard to accept this superstitious explanation for the end of old Duke Godwin, but the secret of his death is more reasonably accounted for, on the theory of Boccascio's story of Calen Drino, where the expected miracle was brought about by the secret mixture of aloes in the bread of the corsned, for, as Lea suggests, Edward the Confessor, both because of his dislike for his father-in-law, and his desire to cast off the tutelage in which he was held, in order to further his self interest and rid himself of a hated enemy, would no doubt have secretly mixed poison with the corsned used in this ordeal and then caused the story to be circulated among the superstitious subjects, to account for the Duke's sudden demise.⁶³

We find that the ordeal was utilized in France, in the tenth century in the notable case of Teutberga, the wife of King Lothair, great-grandson of Charlemagne.

⁶² Roger of Wendover, ann. 1054; Matthew of Westminster, ann. 1054; Chronicles of Croyland, ann. 1053; Henry of Huntington, ann. 1053; Wm. of Malmesbury, Lib. II., cap. 13; Lea, "Superstition and Force," (3 ed.) p. 301.

⁶³ Lea, "Superstition and Force," *supra*.

Desiring to rid himself of his wife, this degenerate grandson of a worthy grand-sire, accused her of incest and forced her to a confession. She afterwards recanted and denied the truth of her confession and offered to establish her innocence by the ordeal of hot water, by proxy.⁶⁴

Hincmar, the most distinguished divine of this period championed the cause of the unfortunate queen and wrote a dissertation upon the infallibility of the test of the ordeals, because they had the guidance of the Divine Wisdom, effectually convincing himself and a large number of the French subjects of the correctness of the judgment by this ordeal, especially when King Lothair so far estopped himself from claiming that he had not desired to get rid of his wife, by espousing his concubine, Waldrada, whom he had, in fact, preferred to the wife he had discredited by the criminal charge against her.⁶⁵

Illustrating the prevalence with which the pagan practice of ordeal had taken possession of the minds of the churchmen of the ninth century, Lea quotes the argument of Hincmar, in his interesting work, "Superstition and Force,"⁶⁶ as follows:

"In boiling in water the guilty are scalded and the innocent are unhurt, because Lot escaped unharmed from the fire of Sodom, and the future fire which will precede the terrible judge, will be harmless to the saints, and will burn the wicked as in the Babylonian furnace of old."

⁶⁴ Lea, "Superstition and Force," (3 ed.) p. 247.

⁶⁵ *Ante idem.*

⁶⁶ Lea, "Superstition and Force," (3 ed.) p. 247; Hincmar, de Divert. Lothar. Interrog. vi.

Of course the correctness of this syllogism, depends upon the correctness of the first assumption, based upon the delusions and superstitions of a past age, but the conclusion seemed to satisfy a large number of that day, judged by the standards then obtaining, among which was the idea of a Deity who was a bigger, stronger, crueller man—a more “terrible judge.”

Some few of the many interesting trials by ordeal, which obtained during the twelfth century in the reigns of Richard I and King John, have been reproduced by Sir F. Palgrave, in his “Proofs and Illustrations,” to be found in the *Rotuli Curiae Regis*⁶⁷ for those reigns. Let us examine a few of these old Rolls.

“*Roll of the Iter of Wiltshire, 10 Richard I.*—The jurors say that Radulphus Parmentarius was found dead with his neck broken, and they suspect one Christina, who was formerly the wife of Ernaldus de Knabbewell, of his death, because Radulphus sued Christina in the ecclesiastical court for breach of a promise of marriage she had made to him and after the death of her husband Ernaldus, Reginald, a clerk, frequented her and took her away from Radulphus, and Reginald and Christina hated Radulphus for suing her, and on account of that hatred, the jurors suspect her and the clerk of his death. And the country says it suspects her. Therefore, it is considered that the clerk and Christina appear on Friday, and that Christina purge herself by fire.⁶⁸ *Roll of the Iter of Staf-ford, in 5 John.*—One Elena is suspected by the jurors,

⁶⁷ Palgrave erroneously states that the *Retuli Curia Regis* is the “oldest judicial record in existence.” The records of trials obtaining during the reign of Hammurabi, 2250 years before Christ, are in existence. See Chapter on “*Recall of Judges*,” John’s “*Laws of Babylonia*,” etc.

⁶⁸ Palgrave’s “Proofs and Illustrations,” clxxxviii; Stephen’s “Criminal Procedure,” II. Essays in Anglo-American Legal History, pp. 487, 488.

because she was at the place where Rainalda de Henchenhe was killed and because she was killed by her help and consent. She denies it. Let her purge herself by the judgment of fire; but as she is ill, let her be respited, till she gets well.

Andrew of Bureweston is suspected by the jurors of the death of one Hervicus, because he fled for his death, therefore let him purge himself by the judgment of water.¹⁶⁹

During the witchcraft craze, in Europe, the ordeal of fire and water was frequently invoked by the accused persons, to clear themselves of the charge, but so incensed were the people against those arraigned for this offense that it was difficult to convince the courts and juries of the innocence of the alleged offender, even by this supposed infallible test of the judgment of God. It was presumed that the Devil interfered with the correctness of the termination of the tests in this hated crime and so the poor suspects were condemned, after suffering untold tortures, even though the test of the ordeal favored their innocence of the charge.

The Inquisitor Sprenger cites the case of a witch, tried before the Count of Furstenberg, in 1484. The accused invoked the test of the red-hot iron and the Inquisitor attributed his acquiescence to his youth and inexperience and the fact that he was not acquainted with the methods of the Devil, to further the cause of the sorcerers. Although sentenced to carry the hot iron only six paces, the supposed witch carried it six paces and offered to hold it still longer, if required, as she displayed her hand wholly uninjured. The Count

¹⁶⁹ Palgrave's "Proofs and Illustrations," clxxxv; Stephen's "Criminal Procedure," *supra*.

was thus compelled to render a judgment of not guilty against the accused person and at the time Sprenger wrote, in 1487, he reported that she still lived "to the scandal of the faithful."⁷⁰

The superstition connected with the trial by ordeal, as a means of detecting the guilt or innocence of the participants of the foul crimes of the middle ages, early took a firm hold of the popular imagination and we find repeated references to the ordeal, in the dramatic and popular literature of the different countries where this mode of trial obtained.

The heroic Iceland song of the Elder Edda, supposed to have been composed between the sixth and eighth centuries, utilizes the ordeal as a means of bringing to justice the false witness borne by the accuser, the Concubine Herkia, in her charge of adultery against Gudrun, the wife of Atli.⁷¹ First describing the test, resulting in the innocence of Gudrun, and then the proof of the guilt of her accuser, the poem proceeds:

"She to the bottom plunged her snow-white hand,
And up she drew the precious stones,
'See now, ye men, I am proved guiltless,
In holy wise, boil the vessel as it may.'
Laughed then Atli's heart within his breast
When he unscath'd beheld, the hand of Gudrun."

"'Now must Herkia to the cauldron go,
She who Gudrun had hoped to injure.'
No one has misery seen, who saw not that,
How the hand there of Herkia was hurt.
They then the woman led to a foul slough.
So were Gudrun's wrongs avenged."

⁷⁰ Malleus Maleficar. Francof. 1580, pp. 523-31; Lea, "Superstition and Force," (3 ed.) 264.

⁷¹ Benjamin Thorpe's Elder Edda, pp. 106, 107; Prof. Bugge's Ed. of Copenhagen, (1867); Prof. Rask's ed. of 1818; Lea, "Superstition and Force," (3 ed.) 335.

The ordeal of the bier was exemplified in the current literature of the age of Richard Coeur-de-Lion, for the histories of that King report that when he met the funeral procession of his father Henry II, at Fontevraud, the blood spurted from the nose of the deceased, because of the treason and rebellion of which his son had been guilty.⁷²

Shakespeare utilizes this story of Richard Coeur-de-Lion, in the funeral scene, in Richard III, where Lady Anne, when interrupted in her grief at the bier of Henry VI, is made to say to the by-standers:

"O gentlemen, see, see: dead Henry's wounds
Open their congeal'd mouths, and bleed afresh."⁷³

In Sir Walter Scott's "Minstrelsy of the Scottish Border" we also find a reference to this ordeal of the bier, when, in the ballad of Earl Richard, this author established the innocence of the maid, by this test:

"Put na the wite on me,' she said;
It was my may Katherine.'
Then they hae cut baith fern and thorn,
To burn that maiden in.

It wadna take upon her cheik,
Nor yet upon her chin;
Nor yet upon her yellow hair,
To cleanse that deadly sin.

The maiden touched that clay-cauld corpse,
A drap it never bled;
The lady laid her hand on him,
And soon the ground was red."

⁷² *Benedicti Abbatis Gest.* Henr. ann. 1189; Roger de Hoveden, ann. 1186; Lea, "Superstition and Force," (3 ed.) 316.

⁷³ Richard III., Act I., Scene, II.

Sir Walter Scott uses the ordeal of the bier in the "Fair Maid of Perth," in connection with the killing of Oliver Proudfoot, who was killed with a locharbar axe. On the principle that "murder will out," while the body lay in state at the High Church of St.

And thus Scott uses the ordeal of the bier to establish that the accuser was herself the guilty person⁷⁴ and the Bard of Avon and the Elder Edda utilize this ordeal and that of the boiling water, to demonstrate the infallibility of this Divine test, when applied, to ascertain the guilt or innocence of one accused of such crimes as may legitimately be the subject of this character of proceeding, known to the ancient law as one of the Judgments of God.

The ordeal was entirely a judicial proceeding, regularly used, in an early day, for the trial of criminal cases, before the civil and ecclesiastical courts. The accused had no alternative but to undergo the trial by ordeal, for when ordered to submit to it, the order had the force and effect of a regular judgment of the court.⁷⁵ A failure to comply with the order of the court to undergo a trial by ordeal, was treated as a contempt of court, and under the early English law, the accused who refused to submit to such a test, was outlawed and his property was confiscated, the same as if he had been adjudged guilty of the offense, for in refusing a compliance with the mandate of the law, he placed himself beyond the pale of the law and later could not claim the right to a lawful trial.⁷⁶ The Anglo-Saxon codes allowed no alternative but contained di-

John, in Perth, the servants of Sir John Ramorny were required to pass by the corpse and touch it, but when Bonthron, the person who had really slain the deceased, came to the body, he refused to touch it and claimed the right of trial by battle. ("Fair Maid of Perth," Chapter XXIII.)

⁷⁴ Lea, "Superstition and Force," (3 ed.) 335.

⁷⁵ II. Pollock and Maitland's History English Law, 650; Lea "Superstition and Force," (3 ed.) 333.

⁷⁶ *Ante idem.*

rect and specific provisions for the trial by ordeal, in all its different phases.⁷⁷

The circumstances and conditions under which ordeal was employed, in the trial of the various felonies known to the early Saxon laws, varies, necessarily, with the customs and legislation of the different rulers, and sometimes we find that the right of selection obtained, between this and other modes of compurgation, or between the different forms of ordeal.⁷⁸

Little, if any good, could result from a discussion of the power of a Court to order submission to such barbarous treatment, for the courts assumed the power and it was backed-up with the influence of the Church and the authority of the King. The citizens could do little else than submit to such a formidable alliance, which proceeded in the name of the Majesty of the Law and the Solemn Assurance of the Church, for there were no constitutions to protect the citizens from cruel or unusual punishments; might was right when used against the weak and oppressed and the power of the Church and State was too much for any individual to overcome. Society was not organized, as at present, to protect the rights of the individual, but the Church and State were all-powerful and their orders had the force to overcome all private resistance.

As shown, in the beginning, the institution known as trial by ordeal, like many other of the cruel customs of the ancient world, had the Mosaic law as its foundation and the Church's approval, in the construction of the foundation and the recognition of the whole institution. The Church was not only ready to accept the bar-

⁷⁷ II. Cnuti, Saec. cap. xxx, xli.

⁷⁸ L. Henrici, I., cap. lxv, sec. 3.

barous practices of its pagan converts but itself gave them fresh claim to confidence, by throwing around them the solemn ceremonies of its own approval. The ordeals were all conducted with the aid of the priests, and prelates in all the Catholic countries were everywhere granting special charters authorizing the privilege of trials by ordeals.⁷⁹

But as the Church was partly responsible for the practice of trials by ordeal, because the Churchmen were but human and, as such, entered into the manners and customs of the people of the period when they lived, the Church had no inconsequential part in abolishing this barbarous custom, for ever since the sixth century and perhaps from the beginning of the custom, eminent Churchmen had opposed the institution as a pagan custom, not authorized by the teachings of the ancient Jews or the religion of Christ, and finally, the protests of these wise Churchmen culminated in the suppression of this old test, and in 1215 the Lateran Council forbade the clergy from afterward taking part in the ceremony known as trial by ordeal.⁸⁰ And Henry III, following the lead made by the Church, "Seeing that the judgment of fire and water is forbidden by the Church of Rome," directed his judges, starting on their circuits, to adopt other methods of proof and to forever discard this brutal test.⁸¹

⁷⁹ Lea, "Superstition and Force," (3 ed.) 354, 356; Annal. Benedict. L. 57, No. 74, ann. 1036.

⁸⁰ Concil. Lateran. IV., c. 18; II. Pollock and Maitland's History English Law, 599.

⁸¹ Rymer, Foed. I., 228; II. Pollock and Maitland's History Eng. Law, *supra*.

Illustrative of the approval of the church of Rome in the ancient procedure by ordeal, we find, in the ninth century that Hincmar

If the Church was remiss in its duty to oppose the ordeal, therefore, in the beginning, it brought about the repression of the practice, and is, at least, entitled to the benefit of the approval of the friends of humanity for this tardy beneficence, upon its part.

If true that every age, like every person, has its own sins and short-comings to answer for, and that is the happiest which best succeeds in hiding them for a time,⁸² then the age of the trial by ordeal, according to our twentieth century standard, was guilty of a sin that the past centuries must atone for, if atonement is essential for the wayward customs of a pagan race, struggling without compass or needle, amid the darkness of a barbarous age, to steer a straight course. They should not be held to more than the ordinary standards of right and wrong then prevailing, in their efforts to find the higher law for society, when just able to attempt to clamber up the mountain heights of wisdom. The inhabitants of the centuries who utilized the trial by ordeal had not then perfected their judicial system so that very high ideals of individual right obtained, but they had made wonderful strides in the arts and sciences, while practicing this hideous custom of trusting to the wisdom of God, in the trials of men and women for their offenses against society, as judged

expatiated upon the blessing of such a test, in that it combines "The elements of water and of fire: the one representing the deluge—the judgment inflicted on the wicked of old; the other authorized by the fiery doom of the future—the day of judgment, in both of which we see the righteous escape and the wicked suffer." Hincmar, *de Divort. Lothar. Interrog.* vi; Lea, "Superstition and Force," (3 ed.) 244.

⁸² Lea, "Superstition and Force," (3 ed.) 370.

by man made laws. We have elevated the standards of the judicial system somewhat, since that period, but in our own time, a large number of people, instead of further establishing the independence of the judiciary, are favorable to submitting to popular vote, the correctness of a given decision, or the judicial fitness of a judge; mormonism only recently was abolished and instead of the superstition and delusion which invoked the judgment of God in trials of witches and others accused of unproven crimes, we have spiritualism and other similar protests against rationalism and reason, so we are not yet in a position to condemn, in unmeasured terms, our older brothers of the day of trials by ordeal.

CHAPTER VI.

PEINE FORTE ET DURE.

Peine forte et dure,¹ or, the “strong and hard pain,” as it was most appropriately termed, was the name given in Europe to the particular kind of punishment formerly inflicted upon a prisoner, charged with felony, where he stood mute and refused to answer on his arraignment, or having entered his plea of not guilty, where he peremptorily challenged more than twenty jurors, which was quite generally considered a contumacy equivalent to standing mute.²

Generally, in indictments for high treason and the lower felonies and misdemeanors, standing mute was held equivalent to a conviction and the prisoner was sentenced and received his punishment, just as if he had entered a plea of guilty or suffered a conviction. But in all other felonies the prisoner was required to plead to the indictment, before a conviction could be obtained and if he obstinately stood mute, or refused to plead, he was subjected to the *peine forte et dure*, a judgment purposely ordained to be exquisitely severe, that by that very means it might rarely be put into execution.

The judgment for standing mute, was: That the prisoner be remanded to the prison from whence he came, and put into a low, dark chamber, and there be laid on his back, on the bare floor, naked, unless where decency forbids; that there be placed upon his body

¹ The terms are pronounced pān fōrt ā dūr.

² II. Reeve's History English Law, p. 423.

as great a weight of iron as he can bear; and more, that he have no sustenance, save only, on the first day, three morsels of the worst bread; and on the second day three draughts of standing water, that should be nearest to the prison door; and in this condition, this should be alternately his daily diet, until he answers to the indictment.³

To understand how such an inhuman institution as that of pressing prisoners to death came into existence, it is necessary to understand somewhat the history of criminal proceedings of the period when it obtained. The motive which would induce the prisoner charged with felony to submit to this terrible punishment, rather than enter his plea, was no doubt to escape the attainder which would result from a conviction for felony. If he was convicted of felony, his goods were forfeited to the crown and in the case of capital felony, corruption of blood followed attainder and the felon could neither inherit nor transmit landed property.⁴ Where the prisoner had heirs, therefore, and possessed any estate, his attachment and affection for his heirs or children frequently prompted him to suffer the punishment of being pressed to death, to avoid the attainder of his name and the corruption of his blood, for death and attainder

³ Coke, 2 Inst. 178, 179; Hale's P. C. vol. ii, 322.

"He was to be laid down, naked, upon the ground, on his back, his feet and head and loins covered, his arms and legs drawn apart, by cords, and as much weight of iron or stone as he could bear, was placed upon his chest." This punishment was called also, "pressing to death." Bouvler's Dictionary; II. Reeve's History English Law, 134; 4 Sh. Bl. Comm. 324; Britton, ch. 4 fol. ii; Fleta, lib. I., 34, sec. 33.

⁴ Coke, Litt. 130a, 391; 6 Coke, 63a, 63b; I. Bishop's Crim. Law, 641.

would both result from the conviction, which was frequently certain to result, in any event.

Trial by ordeal obtained in England until the thirteenth century,⁵ and as a part of the procedure obtaining when this barbarous custom prevailed the prisoner when asked "Culprit, how will you be tried," replied, "By God," meaning that he would be tried by ordeal, rather than "By my country," which was the request for a jury trial. When the prisoner stood mute and refused to plead, the court was so perplexed that frequently the prisoner would escape by some trivial punishment, as the procedure of the period did not include this kind of a case, so the astute criminal lawyers of these times no doubt frequently practiced this subterfuge to perplex the court and secure the escape of a guilty client. Legal forms at this period had much greater efficacy than at present when we have statutes of jeofails and look to the substance, rather than the forms of things, and it was unheard of then to try a prisoner by ordeal, before he entered his plea, or even to put him upon his country, so where he stood mute, the difficult thing was to secure his consent to try him by either method.

Under the stress of the perplexity of having found concrete cases not covered by the custom and practice of the period, the judges instantly ordered some of the offenders standing mute on malice, to be put to death,

⁵ II. Essays in Anglo-American Legal History, 392, 396, 486, 488.

There is no doubt but that for a long time after the year 1215, the law did not know what to do with a man who stood mute and refused to plead and the *peine forte et dure* was an institution slowly and painfully evolved from the customs of the past. II. Pollock and Maitland's History English Law, p. 650.

for refusing to consent to be tried, according to the custom of the realm, but this was practically judicial murder, as the defendant had not been legally convicted, before sentence, so the pendulum of public sentiment swung back from this precedent and brought about a great revulsion to this practice.

In the beginning of the thirteenth century the penalty for refusing to plead consisted merely of a severe punishment, with low diet, until the obstinacy was overcome, and latterly, the practice prevailed, which had no legal sanction, of tying the thumbs together, with whipcord, that the pain might induce the prisoner to plead.

During the reign of Edward I., in the year 1275, in the proceedings of the Parliament of Westminster, the first mention is made of this punishment for standing mute through obstinacy or wilfulness. It was enacted by this statute that felons refusing to plead through obstinacy should be confined in the prison, *forte et dure*. They were to go "barefooted and bareheaded, in their coat only, in prison, upon the bare ground continually, night and day, fastened down with irons," only eating and drinking on alternate days, until the plea was entered.⁶ But the courts could not wait for the obstinate prisoners to voluntarily renounce their obduracy and succumb to such mild treatment and the accumulation of cases where the prisoner stood mute and the growing popularity of this offense, seemed to threaten the speedy dispatch of the criminal business of the period. Starvation was then added to the punishment of confinement, but this did not accomplish the

⁶ II. Reeve's History English Law, p. 423; Stat. West. 1. c. 12.

desired end, of forcing these obdurate offenders to consent to be tried, according to the custom then obtaining.

As before seen, the first statute, touching upon this punishment, passed during the reign of Edward I., applied only to "notorious felons," who were "openly of evil name," for these alone, refusing to plead before the justices at the King's suit, were to have the "strong and hard punishment," that the act called for, and by express statutory exception prisoners "taken upon light suspicion" were not to suffer the punishment.⁷

Some writers have taken the position that the punishment, *peine forte et dure* owed its existence alone to this statute, but Sir Edward Coke states that the punishment was assessed at common law, before the enactment of this statute,⁸ and the statute in merely providing for an imprisonment *forte et dure*, was declaratory of an existing punishment assessed by the common law, but not sufficiently described, or limited.

This view is shared by Reeves, who states that this method of treating felons who stood mute was introduced sometime between the fifth year of the reign of King Henry III. or perhaps from the time of Bracton, and the third year of King Edward I. and the punishment did not owe its existence to this statute.⁹

However this may be, we find that during the reign of Henry IV. the mild punishment provided for by the statute of Edward I. and the proceedings detailed by Fleta and Britton,¹⁰ of merely being fastened down

⁷ Statute West, l. c. 12; II. Reeve's History English Law, p. 423.

⁸ 2 Inst. 178, 179.

⁹ II. Reeve's History English Law, p. 424.

¹⁰ Britton, fol. 11, c. iv; Fleta, lib. 1. c. 29, sec. 33.

with irons, on the bare ground of the prison, "until the plea was entered," had given way to the harsher punishment of being compelled to lie under a "*peine*," "*till they were dead*," an event most likely to follow speedily from the quantity of weight or iron placed upon such prisoners. The *peine forte et dure*, as it was known, therefore, from the fifteenth to the eighteenth century, seems to have been firmly established as an institution of the English Criminal Law, during the time of Henry IV., and the reason for its existence is to be found in the object of the justices in eyre and justices of gaol delivery, of obviating the necessity of remaining for long periods in the English country towns, waiting for the mild effect of the formerly prevailing punishment, provided for by the statute of the reign of Edward I., in inducing prisoners charged with felony to consent to be tried.¹¹

The prevalency of the practice of standing mute in such cases, under the milder form of punishment, increased to such an extent that the patience of the justices was sorely tried. They determined, about the beginning of the fifteenth century, to put an end to such a practice, by furnishing such a harsh punishment that the example of inflicting it would discourage prisoners from thus defying the law, even if it resulted in the speedy and painful death of the offender. All exhortations and mild treatment were abandoned and the obdurate prisoner, thus defying the court, was sentenced to be literally "pressed to death," unless he recanted and submitted himself to a trial, according to the fixed customs of the realm.

¹¹ III. Reeve's History English Law, 439.

It may justly be doubted if the defiance of the majesty of the law by this failure to plead was sufficient to justify such a barbarous practice, with the object of compelling a respect for the law, or if the remedy was not really worse than the disease, but upon this philosophical phase of the subject we are not concerned. Whether justly or unjustly, this species of punishment obtained for three centuries and a half in the English criminal law and a great many concrete cases, illustrating the application of the custom, arose during this period. And it is interesting to note how the punishment was made more severe with the increasing prevalence of the offense.

In the year 1219, when the first eyre of Henry III's reign was in session, a case arose for the instruction and advice of the King's Council regarding the course to be pursued where the prisoner refused to plead.¹²

It was decided that although the prisoner was charged with the gravest kind of a felony, he was to be safely kept in prison, but the imprisonment was not to endanger life or limb. No suggestion was made of attempting to compel the submission to a trial, and the details of assessing the punishment to be inflicted was left wholly to the discretion of the justices.¹³

The cases occurring before the passage of the statute of Westminster in the reign of Edward I., show that the justices did not have any fixed method of handling the cases wherein the prisoner refused to plead, but took such course as seemed best suited to the individual

¹² *Leges Henri*, 31, sec. 5; *Foedera*, i, 154; *Palgrave, Commonwealth*, 207; *Thayer, Harvard Law Review*, V, p. 265; *II. Pollock and Maitland's History English Law*, p. 650.

¹³ *II. Pollock and Maitland's History English Law*, p. 650.

case before the court. Sometimes the expedient was resorted to of taking the verdict of an exceptionally strong jury and condemning the prisoner, if he was found guilty, regardless of whether he had formally entered his plea or not. During the Warwickshire eyre of 1221 Martin Pateshull pursued this course, on two different occasions.¹⁴ The prisoner stood mute and refused to plead, but the twelve hundredors and twenty-four other knights, having sworn to his guilt, he was hanged.¹⁵

In 1222, on the refusal of a prisoner accused of receiving felons, to plead to the charge, at Westminster, the court merely committed him to prison, to be held in solitary confinement, although the townships and the knights of the shire had declared him guilty.¹⁶

During Bracton's time, the procedure does not seem to have taken the course that it did in later years, as he speaks of the method of compelling a man to place himself upon the country and states that he was considered undefended and quasi-convict, if he refused.¹⁷

Thus, it appears that before the enactment of the statute of Edward I. the cases arising were determined without any fixed rule governing the punishment to be assessed, but a few years after this act, the prisoner was laden with irons and in the course of a short period the hideous *peine forte et dure* was developed.¹⁸

During the reign of Edward III. the courts adopted starvation as a remedy for refusing to plead to an in-

¹⁴ II. Pollock and Maitland's History English Law, p. 651.

¹⁵ Select Pleas of Crown, pl. 153, 157; Hale's Pl. Cr. ii, 322.

¹⁶ Note Book, pl. 136.

¹⁷ Bracton, fol. 142b, 143b.

¹⁸ Year Book 30, I. Edward I., 511, 503, 531; Britton, i, 26; Fleta, p. 51; II. Pollock and Maitland's History English Law, p. 652.

dictment for murder, as the case of Cecelia Ryge way illustrates. She was indicted for the murder of her husband and refusing to plead, she obstinately stood mute. She was committed to prison and lived without meat or drink for a period of forty days and nights, when she was allowed to go free, as her wonderful longevity, without food, was ascribed to the influence of the Virgin Mary, whose intercession could only be reconciled with the innocence of the defendant.¹⁹

Starvation was generally discarded sometime after the statute of Edward I. and after the reign of Henry IV. the *peine forte et dure* was the regular and lawful mode of punishing persons who stood mute and obstinately refused to plead in charges of felony.

In 1442 Juliana Quick was arraigned upon a charge of high treason, for speaking contemptuously of the King, Henry VI. She refused to plead and it having been determined that her refusal was obstinate, rather than by an infirmity of nature, she was "pressed to death," in a summary manner.

The case of Margaret Clitherow, who was pressed to death at York, on Lady Day, March 25', 1586, is most pathetic, as narrated by her spiritual adviser,

¹⁹ Watt's "The Law's Lumber Room."

During the reign of Henry VII., we find two felons, who had been taken from sanctuary, at Southwark, on being arraigned before Sir Thomas Frowike urged their plea of sanctuary, which was overruled, and, on being commanded to plead to the felonies, and refusing, they were peremptorily ordered to be taken back to the jail and there placed upon the bare ground, and that more weight should be placed upon them than they could stand and they be given only bread and water, until they die; in short, that they be literally *pressed to death*, or suffer the terrible *peine forte et dure*. (21 Henry VII., Kellway, 70; IV. Reeve's History English Law, Finlason's note, p. 254.)

the good John Mush, a friendly priest. Margaret's husband was a Protestant, but she was accused of harboring Jesuit and Seminary priests, of hearing mass and other similar offenses and so she was committed to York Castle and later was regularly arraigned in the Common Hall. When plied with the usual question, "Culprit, how will you be tried?" instead of making the usual answer, "By God and my country," the prisoner refused to make any other answer than that she would be tried "by God and your consciences." After repeated entreaties by the court, and continued obstinacy of the prisoner, she was committed to prison and during the intercession of the court Parson Whigington, a puritan preacher, labored long and hard with her to convince her that she ought to forego her obduracy and enter her plea, but she refused to do so. On her second arraignment, when the court seemed about to condemn her to the *peine forte et dure*, Parson Whigington spoke in the interest of the prisoner, calling the court's attention to the fact that "this woman's case is touching life and death; you ought not, either by God's law, or man's, to judge her to die upon the slender witness of a boy." Entreating her twice again to renounce her obdurate plea and to throw her case upon the country, on her refusal, the court ordered "the law to take its course"; she had her arms pinioned with a cord, by the Sheriff and as she was led through the crowd, the jeers and taunts, ever levelled at the unfortunate, in keeping with "man's inhumanity to man," gave the Sheriff the idea that he was to soon become a popular man, by the murder of this defense-

less woman, so he proceeded to his work as if he were, in fact, a hero.

She was urged to press the exemption of pregnancy, but refused, and the Lord Mayor of York, on his knees begged her to enter her formal plea to the charge against her and to submit to trial, as did her friend the good Parson Whigington. She stood firm, as if courting martyrdom, in an attempt to demonstrate the injustice of such a hideous punishment, and finally even the sympathetic Parson Whigington, after expressing his pity, left her and came again no more.

Her execution having been set for Friday, as if in commemoration of the day when the gentle Saviour took his departure upon the cross of Calvary, this innocent woman, on Lady Day, in 1586, also suffered martyrdom and died her death, that the horrible example of this hideous punishment could be made the more detestable. She refused the offer of friends to add sufficient weight to dispatch her immediately, but subjected herself to the torture, as deliberately as any martyr ever took the rack. She was led bare legged and bare-footed through the street, with a loose gown to hide her nakedness and distributed alms to the idle spectators as she passed along. The inhuman wretch who acted as Sheriff was named Fawcett and with no instinct of decency or chivalry, he bade her "put off her apparel," whereupon she pleaded on her knees, that she might be allowed to die in her "smock" and that "for the honor of womankind, they would not see her naked." Fawcett refused this becoming plea, but finally, on the entreaty of her friends, she was allowed to die in a long loose linen robe she had made for the occasion.

She was placed flat upon the ground on her back, with a handkerchief on her face; a door was laid upon her body and her hands were bound by Fawcett to two posts, so that her arms and body made a perfect cross; even as the Holy One of Galilee was taunted by the mob who followed Him to Calvary, so this innocent soul was crossed by the taunts and gibes of the vulgar mob, until finally the weights were placed upon the door. A large, sharp stone had been placed under her back, and seven or eight hundred pound weight was placed on the door and this weight broke her ribs and caused them to burst through the flesh on her sides. She gave but a single cry and exclaimed: "Jesu, Jesu, Jesu, have mercy upon me."²⁰ Let us hope that with the wail of this lost soul the weeping Christ made room for the misguided martyr, in a realm where such Satanic tyranny and intolerable cruelty are unknown. Strange, is it not, that the death knell of this hideous and cruel procedure did not follow immediately, as a result of the aroused and outraged public feeling, after the death of this good woman, in this cruel manner? But when it is considered that such Satanic cruelty could have lasted for sixteen hundred years after the crucifixion of the Saviour—and that all traces of his presence are not entirely eliminated from the earth, as yet—it is quite evident that the ideals of holiness and righteousness are slow to permeate the hearts of all the human family.

Anthony Arrowsmith stood mute and refused to plead to the charge of felony, in 1598, and was accordingly pressed to death, in the usual manner.²¹

²⁰ Law Notes, May, 1910, p. 32; Watt's "The Law's Lumber Room."

²¹ Surtee's History of Durham, vol. iii, p. 271.

Walter Calverly, of Calverly in Yorkshire, was arraigned at the York assizes in 1605, for murdering his two children and stabbing his wife, and on refusing to enter his plea he was pressed to death, in the castle, by a large iron weight, placed on his breast.²²

It would be impossible, in any reasonable space, to recount all the most interesting cases where this inhuman punishment was inflicted, during the last half of the sixteenth and the early part of the seventeenth centuries, as a great many prisoners underwent this torture about this time. For the nine years between 1609 and 1618, for instance, there were thirty-two prisoners subjected to this punishment and among this number three were women, in Middlesex county alone. In the record of these cases the Clerk wrote the words: "*Mortuus en pen fort et dur*," which furnished the sad epitaph for each of the beknighted sufferers who underwent this fearful punishment. The records show that many of these poor prisoners were totally destitute and suffered this punishment either through stupidity of the prisoner or of his counsel, or through obstinacy or indifference to his personal suffering and death.²³

In 1615 Sir Richard Weston, a prisoner of some note, was arraigned for the murder of Sir Thomas Overbury. He stood mute and obstinately refused to plead to the indictment, after being solemnly warned by the judges of the terrible consequences of his persisting in his defiance of the laws of his country. The proceedings were adjourned to give him time for reflection, but

²² Stow's Chronicle.

²³ Watt's "The Law's Lumber Room."

on his continued obstinacy, he was adjudged to suffer the *peine forte et dure*.²⁴

Major Strangeways was pressed to death, at Newgate, in 1657, for obstinately refusing to plead to an indictment charging him with the murder of his brother-in-law, Mr. Fussell. At the Coroner's inquest he was made to take the corpse by the hands and touch the wounds, upon the supposition that if he had committed the murder, the wounds would bleed afresh. Although he was innocent, according to this test, it availed him nothing, however, and he was placed upon trial at the Old Bailey, where so many tragedies were enacted, in the olden time, in the name of the law, and refusing to plead and standing mute, in order to prevent the attainder of his blood and the forfeiture of his estate, resulting from his conviction, so certain to follow his trial, he was condemned to the *peine forte et dure*. The press was placed upon him angle-wise and although of sufficient weight to cause him much pain, it was not heavy enough to kill him, so the spectators, through pity, no doubt, for the sufferer, added the weight of their bodies to that of the press and soon he was out of his suffering and in keeping with the custom of

²⁴ Law Notes for May, 1910, p. 31; Watt's "The Law's Lumber Room."

According to Rushworth, when John Felton was arraigned for the assassination of the Duke of Buckingham, in November, 1628, the Privy Council debated the question of their right to place the prisoner on the rack. It was finally decided that:

"Torture was not, with one exception, permitted at all, and in that one exception, it was permitted neither as a punishment nor as a means of getting evidence, but as a *persuasion*, to induce a man charged with felony, to put himself upon his trial."

Vol. 44 Chamber's Journal, pt. Jan.-June, 1867, p. 373.

the period his dead body was displayed to the vulgar gaze,²⁵ that the morbidly curious could advertise the details of the tragedy and thus deter other offenders from a similar offense.

In the year 1720, a man named Phillips, who stood mute and refused to plead to an indictment for felony, was adjudged to undergo the *peine forte et dure*; he was placed under the press at Newgate and suffered the torture for a considerable time, until he concluded to enter his plea of not guilty and stand trial, in the ordinary manner, so the press was removed and he entered his plea and stood trial.²⁶

And in the following year, one Nathaniel Hawes, upon his arraignment for a felony, stood mute and obstinately refused to enter his plea and on being sentenced to the *peine forte et dure*, he suffered the pressure of a weight of two hundred and fifty pounds for a period of seven minutes and then gave up his resolution and craved the privilege of entering his plea and throwing himself upon the country in his trial.²⁷

In 1726 a man named Burnworth, arraigned for murder, concluded that he would stand mute and try the effects of the *peine forte et dure*. He was sentenced at Kingston to suffer this punishment for his obstinate defiance of his country's laws and after being pressed for an hour and three-quarters, with four hundred pounds of iron, his will was broken. He was taken to the dock and was tried, convicted and hanged.²⁸

²⁵ Watt's "The Laws Lumber Room"; Law Notes, for May, 1910, p. 33.

²⁶ Stowe's Chronicle.

²⁷ *Ante idem*.

²⁸ Watt's "The Law's Lumber Room."

From the number of reported cases that have been inspected, it seems that a great many were unable to withstand the suffering resulting from the application of the weight to their bodies, but when the torture was experienced, they would weaken and conclude to enter their plea.

This was true of John Durant, who was arraigned at the Old Bailey, in 1734. Upon his obstinately refusing to enter his plea upon a charge of felony, his thumbs were first tied together with whipcord and the Sheriff pulled him up taut in the presence of the court and the latter dignitary promised him the *peine forte et dure*, forthwith, if he did not regularly enter his plea to the indictment. On reflection, he concluded to do this, so he was placed upon his trial and filed his plea of not guilty.²⁹

As late as the year 1741, it is reported that a prisoner was pressed to death, at the Cambridge assizes, for standing mute and refusing to plead to a charge of felony, after the tying of his thumbs and other customary procedure was found to be unavailing.³⁰

The only instance noted in which this punishment was ever inflicted in the United States, was in the case of Giles Cory, of Salem, who stood mute and obstinately refused to plead, when arraigned upon a charge of witchcraft and sorcery.³¹

He was arraigned at Salem, in April, 1692, before Hawthorn and Jonathan Curwin. "Mary Walcott, Mercy Lewis, Ann Putnam, Jr., and Abigail Williams affirmed he had hurt them." He was accused of giving

²⁹ Watt's "The Law's Lumber Room."

³⁰ XI Inter. Enc. Sub. Nom. *Peine forte et dure*.

³¹ Washburn, Jud. History, 142; I. Chandler, Cr. Trials, 122.

Elizabeth Hubbard a fit; of hurting Benjamin Gold; of bringing the book to these various witnesses; of being frightened in the cowhouse and of threatening suicide.³²

On September 16' "just as the Autumn leaves were beginning to glorify the earth," he was laid upon the ground, bound hand and foot; stones were piled upon him, till the tongue was pressed out of his mouth." The Sheriff with his cane, forced it in again, when he was dying.³³ And he was the first and last to die for this offense in New England.

In his account of this trial, in the "New England Tragedies," the gentle Longfellow, has made Cory thus explain to Richard Gardner, why he refused to plead:

"I will not plead.
If I deny, I am condemned already,
In Courts where ghosts appear as witnesses,
And swear men's lives away—If I confess,
Then I confess a lie, to buy a life,
Which is not life, but only death in life.
I will not bear false witness against any,
Nor even against myself, whom I count least."

The Sheriff then calls him to his punishment and Cory answers him:

"I come.
Here is my body. Ye may torture it,
But the immortal soul, ye cannot crush."

Gloyd wonders if

"The old man will die and will not plead,"

and while thus wondering, arrives too late to view the test of martyrdom.

³² "Wonders of the Invisible World," by Robt. Calef (1828), pp. 329, 333.

³³ "The Spirits in 1692," Putnam's Magazine, for January and June, 1856, No. 7, p. 509.

In Scene IV, of this tragedy, based upon this sad miscarriage of justice in this New England case, the field near the graveyard is presented, with Cory lying dead, with a great stone upon his breast.

Hathorn and Mather are introduced to the spectators and make a vain attempt to explain and justify the deed and the former points to the dead body of Cory as a horrible example of

"Those who deal in witchcraft and when questioned,
Refuse to plead their guilt or innocence
And stubbornly drag death upon themselves."

But Mather, not satisfied with the proceeding, is thus made to deliver himself:

"In a land like this,
Spangled with churches, Evangelical,
Inwrapped in our salvation, must we seek,
In mouldering statute-books of English courts,
Some old, forgotten Law, to do such deeds?
Those who lie buried in the Potter's field,
Will rise again, as surely as ourselves
That sleep in honored graves, with epitaphs,
And this poor man, whom we have made a victim,
Hereafter will be counted as a martyr."³⁴

The *peine forte et dure*, as an institution of the English courts, continued in effect, as a part of the criminal procedure of the kingdom, until the year 1772, when the statute 12 George III., c. 20, virtually abolished the punishment of pressing prisoners to death for standing mute, when called upon to plead.

This statute declared that any person who should stand mute and refuse to plead, when arraigned for

³⁴ Longfellow's "New England Tragedies."

Tradition has it that Cory was pressed to death in an open field, between the Howard street burial ground and Brown street, in Salem.

Nevins, "Witchcraft in Salem Village, in 1692," p. 107.

felony or piracy, should be convicted, and suffer judgment and sentence to be rendered against him, the same as if he had been regularly convicted, by verdict or confession.

This procedure was again changed in England, in the year 1827 by the more humane rule, that upon a failure or refusal of the defendant in a felony charge to plead to the indictment, "a plea of not guilty should be entered for the person accused,"³⁵ and he was thus given the benefit of the legal presumption of innocence, which the criminal law surrounds all prisoners with and he could be convicted and sentenced for the offense charged in the indictment only after this presumption of innocence had been overcome by the proof of his guilt, even though he stood mute and refused to enter his formal plea.

This latter statute, in substance, has been adopted in most of the United States and the cases arising under these statutes illustrate the beneficence of the new procedure.

In *Commonwealth vs. Braley*,³⁶ in the year 1804, the defendant stood mute and refused to plead and the court proceeded to empanel a jury to try the defendant to ascertain if he stood mute wilfully, or by Act of God, just as the court proceeded when the *peine forte et dure* was in force and on the return of the verdict that the defendant wilfully refused to plead, the court remanded him to jail.

In *Commonwealth vs. Moore*,³⁷ in the year 1812, the defendant was arraigned upon a charge of larceny and

³⁵ 7 and 8 George III., c. 28.

³⁶ I. Mass. 103.

³⁷ 9 Mass. 402.

stood mute and upon a finding of the jury that he stood mute through wilfullness, the court proceeded to sentence him, just as if he had been regularly convicted, evidently proceeding under the statute, 12 George III, c. 20.

In *State vs. Hare*, in the year 1818, in Maryland, the prisoner stood mute and refused to plead, but the court entered up a plea of not guilty for him and proceeded to try him, just as if he had himself entered his formal plea. This enlightened procedure was adopted by Congress at the beginning of the past century, in all cases where prisoners stood mute.

It was provided by Act of Congress, March 3', 1825, that

"If any person, upon his or her arraignment, upon any indictment, before any court of the United States, for any offense not capital, shall stand mute or will not answer or plead to such indictment, the court shall notwithstanding, proceed to the trial of the person so standing mute, or refusing to answer or plead, as if he or she had pleaded not guilty, and, upon a verdict being returned by the jury, may proceed to render judgment accordingly."³⁸

Since the enactment of this federal statute, similar acts have been adopted in most of the United States and the practice now quite generally obtains of entering a formal plea of not guilty, whenever the prisoner stands mute, for any reason and the trial proceeds just as if the defendant had himself entered his plea.³⁹

³⁸ 3 Story, U. S. Laws, 2002 Sec. 14.

³⁹ *Fernandez vs. State*, 7 Ala. 511; *People vs. Thompson*, 4 Cal. 238; *Johnson vs. People*, 22 Ill. 314; *State vs. McCombs*, 13 Iowa, 426; *Commonwealth vs. Lannon*, 95 Mass. 563, holding that the old rule in this state was changed by statute; *Thomas vs. State*, 6 Mo. 457; *Link vs. State*, 50 Tenn. (3 Heisk.) 252.

The punishment for standing mute and refusing to plead, as one of the cruel and extreme methods of procedure of the olden times, has attracted the attention of the poets and writers in the English language.

Shakespeare makes frequent reference to this punishment and always in such manner as to demonstrate that he was thoroughly familiar with the nature and object of the procedure governing the infliction of the penalty upon those who obstinately stood mute, when called upon to plead to indictments for felonies.

Thus, in "Much Ado About Nothing" he makes Hero say to Ursula, when speaking of Beatrice, in the Orchard of Leonato:⁴⁰

"*Hero.* No, not to be so odd and from all fashions
As Beatrice is, cannot be commendable;
But who dare tell her so? If I should speak,
She would mock me into air; O, she would laugh me
Out of myself, press me to death with wit."⁴¹

In "Measure for Measure," when the Duke adjudged that Lucio should marry the woman he had wronged, the latter replied:

"*Lucio.* Marrying a punk, my lord, is pressing to death, whipping and hanging."⁴²

In Richard II, on overhearing the talk of the Gardener and servant, in the Duke of York's garden, concerning the King, the Queen soliloquizes

"*Queen.* O, I am pressed to death through want of speaking,"⁴³
as if she were really in the dock and actually conditioned so that she would suffer the customary penalty for standing mute.

⁴⁰ Act III., Scene I.

⁴¹ White's "Law in Shakespeare," sec. 40, p. 67.

⁴² Measure for Measure, Act V., Scene I.

⁴³ Richard II., Act III., Scene IV.

Pandarus also refers to the *peine forte et dure*, in Troilus and Cressida, in advising them to “press” the bed to death because it stands mute as to their “pretty encounters” thereon:

“*Pan.* * * * I will show you a chamber and a bed,
Which bed, because it shall not speak of your pretty
encounters,
Press it to death: away.”⁴⁴

By a study of the old cases, decided when the *peine forte et dure* obtained, the development of the law on this subject, can best be understood, for like landmarks, pointing the devious course of the tortuous procedure that obtained for centuries, before the evolution of the science, to the point where it was able to preserve the just rights of the individual, consistently with the demands of society, the later cases evidence the gradual decline of the old, harsh punishment for standing mute, and thus, with the abolition of this quandam formal procedure, that was considered such a material part of the old criminal law of England, the law itself has reached a higher plane, from which we can look down upon the crudities and cruelties of the old system, with pity for the multitudes who were subjected to its harsh rules and false standards. And judging the future by the past, we can indulge the hope that many of our own formal procedures will be amended and abolished, to the end that unjust results and delays may be minimized and the attainment of just ideals promoted.

The science of the law should keep pace with the advance of the student of philosophy. The law should ever stand aloof—even as a just parent—from any punishment prompted solely through the mad power of

⁴⁴ Troilus and Cressida, Act III., Scene II.

might. When it has attempted to inflict punishment unjustly, the causes and effects, the advantages, if any and the disadvantage of such procedure, should be thoroughly scrutinized. Laws are man-made, in popular governments and the laws should be improved for the benefit of the people.

We have seen that for centuries, upon the obstinate refusal of a prisoner charged with felony, to enter his plea, the inhuman judgments of the courts—established for the administration of justice—were that he should be literally “pressed to death,” regardless of his guilt or innocence of the charge that he was called upon to answer.

With the passing of this horrible institution—as with others of the past centuries—we can perhaps congratulate ourselves, that with the evolution of the institutions of our civilization, humanity has generally triumphed over inhumanity and the mistakes of our ancestors, although most dearly bought, furnish a lasting object lesson for present and future generations. Every generation, however, has its follies and mistakes and nonsense is not confined wholly to the past ages, but with the errors of the past before us, we ought to avoid the same mistakes that it took such suffering and experience to correct.

However unwise and unjust the standards of our ancestors may have been, which made possible the wholesale legal murder of thousands of human beings, who, for different reasons, defied the fetish and barbarous custom that developed the cruel institution, *peine forte et dure*, this institution, like many others of the past, ought to warn us, like a beacon light, of the

dangerous shoals and reefs, which the ship of state should be safely piloted around. But our own procedure contains many incongruities and erroneous standards, that should be corrected, and while priding ourselves upon the fact that nothing so inhuman as "pressing to death," obtains today, we are still guilty of many "crimes against criminals," which succeeding ages, in the perfection of the science of jurisprudence, will no doubt regard in much the same light as we of the present age look upon the cruel punishment, *peine forte et dure*.

CHAPTER VII.

WAGER OF LAW.

Wager of law, in ancient England, was the practice whereby the defendant was allowed to make oath denying the charge of the complainant and supporting his oath by the oaths of a certain number of his friends or neighbors.¹

The term *wager of law*, comes from the Roman law *vadiatio legis*, from the defendant being put in pledges (*vadios*), to make oath on the day appointed.²

The practice is traceable to the Mosaic law which provided that:

“If a man deliver unto his neighbor an ass, or an ox, or a sheep, or any beast, to keep; and it die, or be hurt, or driven away, no man seeing it; then shall an oath of the Lord be between them both, that he hath not put his hands unto his neighbors’ goods; and the owner of it shall accept thereof, and he shall not make it good.”³

Under the Mosaic law, the rule of practice which now obtains in criminal cases, that the good character or reputation of the defendant is always proper for him to offer, in his own defense, upon the issue of the likelihood of his commission of a crime, was extended to include his right to actually acquit himself of the debt or other cause of action by his own oath, for if he would absolutely swear himself not chargeable and was a person of good reputation, he stood acquitted of the charge, in order to prevent an innocent man from being overcome by a multitude of false witnesses.

¹ Bouvier’s Law Dictionary.

² 3 Bl. Comm. 341; Coke, Litt. 295.

³ Exodus, XXII., 10.

This method of procedure, or similar practices obtained in ancient Babylon,⁴ among the Romans and the northern nations, adjacent to the Roman Empire, as well as among the ancient Israelites.⁵

He who waged his law, under the old Saxon procedure, brought with him, into court, eleven of his neighbors, for by the constitution entered into as a league between Alfred and Guthrun, the Dane, a man's credit, in a court of law, depended upon his reputation among his neighbors, touching his veracity.

The defendant who pleaded *nil debit*, or denied the charge against him, usually concluded his answer with the plea containing the formula:

"And this he is ready to defend against him, the said A. B. and his suit, as the court of our Lord, the King, shall here consider," etc.

He was then placed under surety to *wage his law*, on a day appointed by the judge and on the day named the defendant, in open court, took his oath, which was also confirmed by the oaths of eleven of his neighbors, called compurgators.

The defendant stood at the end of the bar and was solemnly admonished by the judge of the nature and danger of a false oath and if he persisted, he repeated an oath like the following:

"Hear this, ye justices, that I do not owe unto A. B. the sum of ten pounds, nor any penny thereof, in man-

⁴ John's "Babylonian Laws," etc.

⁵ 3 Bl. Comm. 341; Spellman, L. b. 28, c. 13; Stiernh., *de jure Sueon*, l. 1. c. 9.

The clergy were no doubt responsible for the establishment of the practice in England, as it resembles the canonical purgation of the clergy, as well as the *sacramentum decisionis*, of the civil law. (3 Bl. Comm. 342.)

ner and form as the said A. B. hath declared against me, so help me God.'"⁶

And thereupon his eleven compurgators avowed, upon their oaths, that they believed, in their consciences, that he saith the truth.

The oath, therefore, of the defendant, himself, was *de fidelitate*, or on his fidelity, and the eleven compurgators testified *de credulitate* or upon their belief in his integrity.⁷

These oaths had the legal effect of a verdict for the defendant, in all actions of debt, on a simple contract, or in actions of detinue, but the defense was not allowed to persons who did not enjoy a good reputation among their neighbors.

The compurgators acted rather in the capacity of jurymen than as witnesses, for they swore to their belief, not to what they actually knew. In other words, when the accused made oath of his innocence or denied the charge filed against him, they swore that they believed he was swearing the truth. Yet they differed from jurymen in many important particulars. The jury was summoned by a public officer and took an oath to tell the truth, whatever the truth might be—for jurymen then did not sit in trial of issues as today—while the oath helper—or compurgator, merely took an oath to testify to the truth of his principal's oath.⁸

⁶ 3 Bl. Comm. 343; Cap. & Wilk. LL Anglo-Saxons.

⁷ Coke, Litt. 295; 3 Bl. Comm. 343.

As the effect of the compurgators oath was the same as a verdict, this is the reason assigned by Coke and Blackstone, why eleven compurgators were required, under the old codes. 3 Bl. Comm. 343; Coke, Litt. 295; Glanville, Lib. 1, c. 9x.

⁸ I. Pollock and Maitland's History English Law, p. 140.

There is authority for the proposition that in the earliest times, the oath-helpers were necessarily kinsmen of the defendant.⁹ The only obligation recognized by a defendant in either a civil or criminal case was to the injured party and no responsibility was predicated upon a duty owing to the state or to society at large. With the family as a unit, the person charged with a crime could summon his family to repulse an armed attack by the injured person and so he took them with him to the court, to defend him by their oaths.¹⁰ When a person was accused of a crime sufficient to result in a blood-feud, his kinsmen were vitally interested in his acquittal and it is but natural that they proffered their help as oath-helpers for him, but in due course of time, the relatives alone were not required and the compurgators rather assumed the character of disinterested "character witnesses," such as we see today, in all criminal cases, except that instead of swearing merely to the good reputation of the defendant, these compurgators made oath of their firm belief in his oath of innocence of the charge filed against him or of the cause of action set up by the injured party.¹¹

By the laws of Wihtraed,¹² in the seventh century,

⁹ II. Pollock and Maitland's History English Law, 600.

¹⁰ Lea, "Superstition and Force," (3 ed.) 35.

¹¹ II. Pollock and Maitland's History English Law, 600.

It was also a custom for a long time, for the defendant to select his compurgators from the nominees of the injured person, and a case is recorded, as late as 1277, in Leicester, where this was required, but it was soon abolished as too onerous a task for an accused person. II. Pollock and Maitland's History English Law, p. 636, note.

¹² Laws Wihtraed, cap. 16, 21; Lea, "Superstition and Force," (3 ed.) 23.

the king or a bishop could rebut an accusation by his own simple asservation, and the thane or priest by the simple oath, while the laity generally were required to undergo the formal procedure of waging their law by the regular number of compurgators.

Mr. Reeves, in his History of English Law, says that Glanville does not mention the wager of law, as a mode of proof for the defendant in civil suits,¹³ but in this the author must have meant to limit the statement to defenses only, for Glanville expressly describes the proceeding by the tenant, wherein he observes:

“If he should deny all the summonses, he shall, as to each of them individually, corroborate his denial with the oaths of twelve. Should it happen on the day appointed that either of the compurgators fail, or should the person of either of them be justly excepted to, and the vacancy occasioned by either of these circumstances not filled up, the tenant shall, on account of his default, immediately lose his seisin. But, if the tenant thus completely disprove the summonses, he shall, on the same day, answer to the action.”¹⁴

According to Sir Edward Coke, any one who waged his law, in a court of record, prior to *Magna Charta*, in England, was required to bring with him *Fideles Testes*,¹⁵ and this learned author intimates that the number of compurgators was eleven, besides the principal,¹⁶ while the author of “*Les Termes de la Ley*,” in describing the same ceremony, expressly states that the number of compurgators was twelve.¹⁷

¹³ III. Reeve's History English Law, 294.

¹⁴ Glanville, Book I., chap. IX.

¹⁵ Coke, Litt. 168b.

¹⁶ Coke, Litt. 295a; 2 Inst., 44.

¹⁷ *Les Termes de la Ley*, ad voc. *ley*.

Bracton advises us that it was not necessary that the compurgators should be of the same rank as the principal, provided they were trustworthy citizens,¹⁸ and, when treating of the wager of law, in actions by tenants, he states that the land was not to be taken out of the tenant's possession before the tenant had waged his law, nor if he failed in waging it.¹⁹ And he states that the tenant could not wage his law by means of an attorney, constituted for that purpose, but was allowed to urge this plea, only by and through himself, personally.²⁰

In Bracton's day, wager of law was the normal mode of defense and it was then the ordinary procedure for establishing that one had never been lawfully summoned to appear in court;²¹ that a defendant had not deprived a guardian of the lawful possession of his ward;²² that the defendant was not guilty of a breach of a covenant;²³ that the defendant had not wrongfully detained or distrained the plaintiff's cattle or other animals,²⁴ and during this period it was even allowed by way of defense in an action of trespass.²⁵

According to Bracton, however, compurgation was not allowed to dispute evidence of offenses which were apparent to the senses, such as waste, which could be observed, as a physical condition, by any man, for if compurgation were allowed in such cases, the oath of

¹⁸ Bracton, 410a.

¹⁹ Bracton, 366a; 410a.

²⁰ *Ante idem*.

²¹ Bracton, fol. 366; Note Book, pl. 7, 1436.

²² Note Book, pl. 731, 742.

²³ Note Book, pl. 396, 1097.

²⁴ Bracton, fol. 156; Note Book, pl. 477, 741.

²⁵ Somersetshire Pleas, pl. 572.

compurgators would be allowed to overcome the evidence of our senses, which would place a premium on perjury and destroy the best evidence by mere secondary proof.²⁶

The wager of law was not confined entirely to the defendant, however, for according to this author, if the defendant set up an affirmative defense, the plaintiff, by way of reply, was allowed to deny the affirmative defense and to establish his avoidance of the special defense pleaded by the aid of oath-helpers.²⁷

During the reign of Edward III, the right of a defendant to wage his law, was guaranteed in all cases where the right existed in the time of Edward I, the object of the statute being that "many people were grieved and attached by their bodies in the city of London, at the suit of citizens, surmising that they were debtors, and could be proved so by their papers, though they had no deed or tally to produce them," it was therefore enacted that "every man should be received *to his law*, by people of his condition against such papers, and the creditor should not put the party to plead to the inquest unless he chose,"²⁸ so the wager of law was thus preserved to the citizens of London, against mere papers, or verbal testimony as firmly as it was previously practiced in the common law courts.²⁹ But it was provided by statute, during the same reign, that the fines payable before the justices, should be in the presence of the pledges, in all cases, civil or crimi-

²⁶ Bracton, fol. 315b; Note Book, pl. 580.

²⁷ Note Book, pl. 184, 1574.

²⁸ 38 Edward III. st. 1, c. v.

²⁹ III. Reeve's History English Law, 184.

nal, and the pledges were to be advised of the sum of the fine, before they departed.³⁰

The law wager did not seem to be settled so securely that there was no doubt left, of the cases in which it would lie and those wherein it could not be invoked, in this reign, however, for while a defendant was denied wager of law, against his written obligation,³¹ he was allowed to wage his law, in a suit on a deed, by the plea of non-summons, in the same manner that such plea had long been used.³² It was allowed against a receipt, alleged to be by the hand of another than the defendant,³³ and in detinue of charters it was allowed,³⁴ although the charters related to the freehold and ought to be equally as binding upon a defendant as an obligation creating an action of debt.

Wager of law was allowed in all cases where voluntary credit had been extended to the defendant, upon the theory that by giving him credit the plaintiff had estopped himself from denying that he was a man of good reputation, but wager of law was not permitted in charges created against the defendant by the law, for no man was allowed to thus swear away an obligation imposed by the law of the land.³⁵

It was denied in cases of contempt, trespass, fraud or deceit, or for damages for any injury with force; executors and administrators were not allowed, upon grounds of public policy, to deny under oath the obli-

³⁰ 38 Edward III. st. 1, c. 3.

³¹ III. Reeve's History English Law, 295.

³² 28 Edward III. 100a; 29 Edward III., 44b; III. Reeve's History English Law, 295.

³³ 47 Edward III., 18; III. Reeve's History English Law, 295.

³⁴ 38 Edward III., 7a.

³⁵ Coke, Litt. 295.

gations of their testators, since no man could safely wage law of another's contracts; the king had certain prerogatives, which prevented the wager of law, in actions by him, as all wagers of law naturally reflected upon the honesty of the plaintiff, so wager did not obtain in actions by the king.³⁶

And since the wager of law only obtained in favor of those who bore a good reputation for veracity, one who had been outlawed, or attainted for any felony, or one who had become infamous, or who had pronounced the horrible word, *craven*, in a trial by battle, was denied his wager of law.³⁷

And under the old practice, since infants, or those under twenty-one years were not admitted to take oaths, they were also denied the wager of law, but a married woman was allowed the defense, when sued jointly with her husband and it extended in favor of an alien, who was to be sworn in his own language.³⁸

In the thirteenth and fourteenth centuries compurgators were allowed, even in the most serious charges of felony, in England, on the part of a defendant. According to the London custom, in the "great law" used in murder cases, the defendant was required to swear six times, with six compurgators for each oath; in the "middle law," used in charges of mayhem, three oaths, each backed by six oath-helpers, satisfied the law, and in "the third law," used in the smaller offenses, a

³⁶ 3 Bl. Comm. 346.

³⁷ Coke, Litt. 295.

³⁸ 3 Bl. Comm. 346.

Wager of law was never required, in England, but was allowed, as a privilege to the defendant. Coke, Litt. 295.

single oath, corroborated by six helpers, satisfied the law.³⁹

In course of time the "great law" was found to be so onerous that the rule requiring six separate compurgators to as many separate oaths by the defendant was relaxed, so as to allow him to make his compurgation by one oath, supported by thirty-six helpers, but if any one of these failed to support his oath, he was hanged.⁴⁰

And by the last of the fourteenth century even when charged with the capital crime of murder, a citizen liable under the "great law," which formerly required him to make his compurgation by thirty-six oath-helpers, was allowed to either make his compurgation in this manner, or, at his election, to go to trial before a jury of twelve men, for by this period the trial by jury was beginning to take its place as one of the fixed institutions in the administration of the criminal law of England.⁴¹

The trial by oath-helpers, even in murder cases, was not speedily superceded by the trial by jury, however, for as late as the fifteenth century, according to Palgrave, purgation with thirty-six oath-helpers, was allowed at Winchelsea and in other jurisdictions subject to the English common law.⁴²

³⁹ Mun. Gild. I., 56, 59, 90, 92; II. Pollock and Maitland's History English Law, p. 635.

⁴⁰ Mun. Gild. I., 57; II. Pollock and Maitland's History English Law, *supra*.

⁴¹ Mun. Gild. ii, 321; II. Pollock and Maitland's History English Law, p. 636.

⁴² Palgrave, English Commonwealth, pp. 117. Lyons Dover, ii, 300, 315.

By the time of Henry VI, we find the cases in which wager of law was allowed still open to much discussion. It was recognized in actions of debt and detinue⁴³ and in the action of account, it came to be the custom for the justices to examine the attorney for the plaintiff and other persons and to allow or refuse the wager of law to the defendant,⁴⁴ accordingly as the account was found to be an account stated in the presence of auditors, in which case it was not allowed, or an account not taken in the presence of auditors, where the wager was held to obtain.⁴⁵ The theory of denying the wager to cases where an account was had in the presence of auditors was that such an account arose to the dignity of an obligation admitted before competent judges.⁴⁶

A defendant sued upon a debt for board and lodging was denied his law,⁴⁷ but Justices Priscott and Needham, decided, near the end of the reign of Henry VI. that wager of law would lie in an action for board and lodging, if the plaintiff had it in his power to furnish the board or lodging at his own volition and not upon compulsion,⁴⁸ but if the defendant had been imprisoned in the Tower and the board and lodging was furnished by force of the obligation of common humanity, this would so far deprive the plaintiff of his option of furnishing the board and lodging, as to make him a

⁴³ III. Reeve's History English Law, 567.

⁴⁴ This was by virtue of a statute of the reign of Henry IV. III. Reeve's History English Law, c. xviii.

⁴⁵ III. Reeve's History English Law, p. 568.

⁴⁶ 14 Henry VI., 24.

⁴⁷ 39 Henry VI., 18.

⁴⁸ 28 Henry VI., 4.

creditor of such merit as to deprive the defendant of his wager of law.⁴⁹

Where persons were compelled to serve by the statute of laborers, such as plowmen, shepherds, and all servants of husbandry, in an action for wages, the defendant was not allowed his wager of law, because the plaintiff had no option to refuse the service, but in cases where the service was not compulsory, wager of law would lie.⁵⁰

And upon the theory that an attorney could be compelled by the judges of the common pleas court to render faithful service to his client and was not allowed to refuse such service, we find that Chief Justice Fortescue decided, during this reign, that in an action by an attorney for services rendered in such a court, no wager of law would lie on the part of defendant.⁵¹

By the middle of the fifteenth century, in England, the wager of law in criminal cases had begun to fall into disuse, for the method followed in such trials, at Westminster, was such that professional oath-helpers were customarily used and such professional swearers necessarily debased the wager of law in criminal cases.⁵² And in the courts of the country districts it got to be a very easy matter for a citizen of bad repute

⁴⁹ *Ante idem.* III. Reeve's History English Law, p. 569.

⁵⁰ 38 Henry VI., 14, 22.

⁵¹ III. Reeve's History English Law, 570.

Referring to the fact that wager of law was allowed in actions of debt and detinue and the attempt to demonstrate that this was because jury trials were inconsistent with the rights of the parties in these actions, Pollock and Maitland, in their History of English Law, show that the truth is that these actions are older than jury trials. (Vol. II., p. 634.)

⁵² II. Pollock and Maitland's History English Law, p. 636.

to produce his oath-helpers, and his neighbors were afraid to negative the oaths of men who were frequently too desperate to thus antagonize,⁵³ and this led to a gradual preference for the trial by jury, in criminal cases, both on the part of the person accused of crime and by the general public, who came to regard the wager of law, in such cases, with odium.⁵⁴

Long before its repeal, by statute, the old defense had fallen into disuse, and in 1833, by 3 & 4 William IV.,⁵⁵ the wager of law was finally abolished in England, and compurgation in the ecclesiastical courts was abolished during the reign of Queen Elizabeth.

While this irrational procedure obtained in England, the accused in the gravest criminal charges, could avoid punishment, regardless of the notorious character of his crime, without being confronted with evidence of his guilt, if he was able to find compurgators who would testify to their belief in his innocence.⁵⁶ And while he could not invoke this procedure in a case of theft, if the stolen goods were found upon his person, or he had been previously convicted, in all other offenses, he was at liberty to thus acquit himself, by means of his oath-helpers,⁵⁷ and this favorable procedure for the criminals continued long after its abuses were set forth and denounced in the Council of Bale,⁵⁸ in municipal and ecclesiastical courts, although in the king's court, in criminal cases of the graver sort com-

⁵³ *Ante idem.*

⁵⁴ *Ante idem.*

⁵⁵ 3 and 4 William IV., c. 42, sec. 13.

⁵⁶ Jur. Prov. Saxon. Lib. I., Art. 15, 18, 39.

⁵⁷ Lea, "Superstition and Force," (3 ed.) 22, note.

⁵⁸ This protest against this procedure was in the Fifteenth century. Schilter. Thesaur, II., 291.

purgation is said to have disappeared in consequence of what has been styled "the implied prohibition" of the Assize of Clarendon, in 1166.⁵⁹ But the statute of Elizabeth (38 Elizabeth, 3, 5), shows that the wager was in common use in 1596, in actions of debt upon simple contracts.⁶⁰

Turning to some of the instances where the oaths of compurgators, or the wager of law, as known under the old procedure, was utilized to acquit the accused of charges, either in the ecclesiastical or lay courts of old England, we find, in the sixth century, that Pope Pelagius I., when confronted with charges that he was concerned in the troubles which drove his predecessor into exile, exculpated himself, by his oath, taken in the pulpit, while holding the crucifix above his head, denying any implication in the affairs that had resulted in the disgrace of his predecessor.⁶¹

And when Gregory of Tours was arraigned for the use of words which seriously reflected upon Fredegonda, before a Council of Bishops, it was decided that he should acquit himself of the charge by oaths upon three separate altars, which in due time, the accused performed to the complete satisfaction of the Council.⁶²

In the dispute which arose, in 824, between Hubert,

⁵⁹ Pike, *History Crime*, i, 130; Thayer, "Older Modes of Trial," II. *Essays in Anglo-American Legal History*, p. 334.

⁶⁰ Jacob's *Review of the Statutes* (2 ed.), 532.

⁶¹ *Anastas Biblioth.* No. LXII.

⁶² Gregor. Turon. *Hist. Lib.* V., cap. XLIX. The custom of acquitting oneself by swearing on different altars, was an old Anglo-Saxon practice, the plaintiff being allowed to substantiate his claim by oaths upon four altars, while the defendant could rebut the charge by oaths upon twelve altars. *Dooms of Alfred*, Cap. 33; *Fleta*, Lib. II., cap. lxiii, sec., 12.

bishop of Worcester, and the abbot of Berkeley, in regard to the monastery of Westbury, the issue was settled by the oath of bishop Hubert, supported by fifty priests, ten deacons and a hundred and fifty other clerks and ecclesiastics.⁶³

Again, the bishop of Trent, when accused of simony, was ordered by Pope Innocent II. to clear himself with the oaths of two bishops and three abbots or monks, a course that was followed by the accused, to the complete satisfaction of his superiors in the church.⁶⁴

Compurgation was, indeed, for many centuries the common procedure whereby Churchmen, when accused of simony, or other irregularities, cleared themselves of the charges filed against them, and it seemed almost invariably an easy task to find other brothers of the order willing to stand by the accused and render him the assistance of an oath in the belief of his innocence, perhaps because of the frequency of such charges and the uncertainty of the future and that necessity might place the compurgators in a position where they might desire the reciprocal service, rendered to their unfortunate companion.⁶⁵

In the thirteenth century the earl of Warenne, or his men, slew Alan de la Zouche, in Westminster Hall, in the presence of the king's justices. He was allowed to escape with his compurgators' aid, according to the rule then obtaining, by his own oath, supported by the oaths of twenty-five knights, that the deed was not done with malice aforethought, or in contempt of the king, but under the heat of passion and under such

⁶³ Spelman, Concil. I., 335.

⁶⁴ Lea, "Superstition and Force," (3 ed.) 57.

⁶⁵ *Ante idem*, p. 61.

circumstances as to reduce the offense to simple manslaughter.⁶⁶

In the Bedfordshire eyre, of the year 1202, in a prosecution under the statute for selling beer under a false measure, the defendant when placed upon her trial, claimed the right of compurgation and was ordered to defend herself "twelve handed" and she met the demand of the court by the offer of her compurgators.⁶⁷

In April, 1435, Agnes Archer was indicted for the alleged murder of Alice Colynbrough, at Winchelsea, whom she was charged with having stabbed five times in the throat, with a knife. The defendant, when arraigned for this crime entered a plea of not guilty, by declaring, as the report of the case records it: "I am not guilty of thoo dedys, ne noon of hem, God help me so." And when interrogated by the Judge as to how she would acquit herself of this charge, she replied: "By God and by my neighbors of this town," so the charge being one which brought the case within the rule of the "Great Law," she was required to acquit herself by the oaths of thirty-six compurgators.⁶⁸

In 1440, in a suit for board and lodging furnished the defendant by the plaintiff, one Counselor, Yelverton, for the plaintiff, contended that the defendant was not entitled to his wager of law, in this action, but the justices held that wager of law would lie in a suit for board and lodging.⁶⁹

⁶⁶ Ann. Wint. 109; Wykes, 234; II. Pollock and Maitland's History English Law, 636.

⁶⁷ Maitland's Pl. Cr. i, case, 61; Palgrave's Com. ii, cxix, note.

⁶⁸ Lyon's History Dover, ii, 265; II. Essays in Anglo-American Legal History, 385.

⁶⁹ Year Book, 19 Henry VI., 10, 25.

During the reign of Henry VI., in the year 1454, quite a memorable legal battle was waged concerning the right of a defendant, in a real action, to wage his law upon a plea of non-summons. The plaintiff demurred to this plea and the justices were divided upon the propriety of recognizing the plea. Chief Justice Pris-cot and his associates, Danvers and Danby, overruled the demurrer to this plea, holding that the defendant could urge his wager of law in a real action, while admitting that the practice had been otherwise. The minority of the court, however, dissented from this view, much as the minority frequently dissent in modern times and Moile and Ayshton earnestly pressed their views upon the majority of the court, for the reason that, "All our law is directed by usage or statute; it has been used that no one wages his law in trespass, and the contrary in debt; so that we should adjudge according to the use."⁷⁰

In the year 1492, one Sebastian Giglis complained to the Chancellor against Robert Welby, that complainant had persuaded a third party to advance a certain sum of money to Welby, who promised to repay the loan and then when he was sued therefor, by the creditor, he had waged his law and the result was that complainant had been compelled to pay the loan, so advanced, at his instance, to Welby. In his answer to this plea, Welby admitted the loan, but set up that he had procured the money for King Richard III., who had received and used the money and that the receipt given was a mere memorandum of the transaction, but not under seal, and he attempted to wage his law to

⁷⁰ Year Book, 33 Henry VI., 7, 23.

this debt. The court refused to recognize the wager of law in this case, but held that in as much as the plaintiff had paid the debt for money had and received by the defendant, and since the defendant admitted the debt, and the receipt of the money, it was immaterial that he had given it to another, and adjudged that he should pay the plaintiff, and that no wager of law would lie in such a case.⁷¹

In the year 1587 the Star Chamber refused to entertain a criminal charge of perjury against a man who was charged with having perjured himself in waging his law, in a prior proceeding. The Lord Chancellor rather dissented from the decision of the majority of the judges and asked if the effect of the wager, based on perjury was to discharge the debt sued for. The judges answered that it was, Manwood, C. B., maintaining that it was because of the plaintiff's folly, in suing for debt, rather than upon an assumpsit, wherein wager of law would not lie.⁷²

In his report of Slade's case, in 1602, Sir Edward Coke remarked that the court would not allow a man to wage his law, until the court had admonished both the principal and the compurgators and upon due examination as to their qualifications and the merits of

⁷¹ Cal. Proc. in Chan. i, ccxx-ccxxii. In Spence's Equity Jurisprudence, this case is cited as one of the notable cases which finally helped to bring about the repeal of the law wager.

⁷² Goldsborough, 51, pl. 13; Doctor and Student, ii, c. 24; Thayer's "Older Modes of Trial," II. Anglo-American Legal History, p. 388.

In the persecution of the reformers, in 1527, under Henry VIII., Margaret Cowbridge and Margery Bowgas were allowed to acquit themselves by the oaths of compurgators, although there were several witnesses against them, and the compurgators comprised several women in the test.

the cause, in order to ascertain if the case was one wherein wager of law was allowable.⁷³

Several cases came before Chief Justice Holt, during the latter part of the seventeenth century and some of the cases, which have been noted, will be briefly referred to.

In the *Company of Glazier's Case*, which arose in 1699, the Company sued in an action of debt and the defendant waged his law. Counselor Northey appeared for the Company and when the defendant appeared with his compurgators, he insisted that if he swore falsely, the court did not have to receive his wager of law, but to this contention, Chief Justice Holt replied: "We can admonish him, but if he will stand by his law, we cannot hinder it, seeing it is a method the law allows." Plaintiff's counsel then insisted that such a holding would be a dangerous precedent, because it would have the legal effect of compelling litigants sueing in debt, to extend the practice of sueing upon an *assumpsit* still further, but the doughty Chief Justice replied to this argument that "We will carry them no further," so the wager of law was received, because it was a "method the law allows."⁷⁴

The Chief Justice practically reversed his holding in the *Company of Glazier's Case*, two years later, however, for in exactly the same kind of an action of debt, arising on a by-law, in *London vs. Wood*, the court refused to entertain the defendant's plea of wager of law, remarking that the plaintiff's counsel in the *Company of Glazier's Case* (Northey), had yielded too

⁷³ *Slade's Case*, 4 Rep. p. 95.

⁷⁴ *Company of Glaziers' Case*, 2 Salk. 682.

much—although he seemed to do all that an earnest counsel can do, to urge his plea and then except to the court's action, when it is overruled—in characterizing that decision, the court observing that "It was a gudgeon swallowed and so it passed without observation," meaning that a bad precedent had been recorded because not strenuously enough objected to.⁷⁵

In this case, the action was on a city by-law, for the penalty provided for the refusal of the defendant to serve as sheriff. According to the custom of London, the defendant offered to wage his law, with six good and reputable compurgators, but to this plea the plaintiff demurred, and in considering the issue of law, on the question of the right of the defendant to wage his law, in such an action, Baron Hatsell reviewed the older decisions bearing upon the defense of wager of law and maintained that it would lie in five certain cases only, "first, in debt on simple contract, which is the common case; secondly, in debt upon an award, upon a parole submission; thirdly, in an account against a receiver; fourthly, in detinue, and fifthly, in an amercement in a court baron, or other inferior court, not of record."

Lord Holt repudiated the reasoning which limited the wager to any specific classes of actions, but maintained that the wager could only be made to depend upon other distinctions, growing out of the very nature of the cause of action and not the mere class to which it might belong.

⁷⁵ 12 Mod. 669, 684.

In Gunner's case, in 1708, the plaintiff took a non-suit when the defendant was ready to wage his law. Jacob's Review of the Statutes, (2 ed.) 532.

In the course of his opinion in this celebrated case, he observed:

“This is the right difference, and not that which is made in the actions, viz., that it lies in one sort of action and not in another; but the true difference is when it is grounded on the defendant’s wrong; * * * for if debt be brought, and the foundation of the action is the wrong of the defendant, wager of law will not lie. * * * The secrecy of the contract which raises the debt is the reason of the wager of law; but if the debt arises from a contract that is notorious, there shall be no wager of law.”⁷⁶

The great Chief Justice was far too independent to be bound by the dictum of some previous case, which did not commend itself to him, according to the touchstone of reason or logic. He had a naturally inquiring mind and sought to go deep into the mysteries of things. Refused credence to the absurd or allegiance to an arrogant authority and was too broad to be bound by mere doctrine, but of course could only judge according to the standards of his time.

This decision marks the trend of judicial thought of the period to further limit and deny the wager of law, because of the fact that it was becoming to be considered contrary to the prevalent sense of right of the

⁷⁶ *London vs. Wood*, 12 Mod. 669, 679. This opinion of Lord Holt, that wager of law would not lie, unless the debt was a secret debt, is based upon the law, as stated by Sir Edward Coke, for he says: “The reason wherefore, in an action of debt upon a simple contract, the defendant may wage his law, is for that the defendant may satisfy the party in secret, or before witnesses and all the witnesses may die.” (II. Inst, 45.) But of course this same plea of payment would be good, whether the debt arose on contract or in parole, and the same reason would obtain for perpetuating the testimony, and this illustrates how an erroneous custom will live upon irrational doctrines.

great mass of citizenship, to permit one who was sufficiently elastic in his conscience, to swear away the debt or obligation of another, just as formerly it had come to be regarded as wrong to permit the accused in a criminal case, to set aside the public law which he had violated, by means of the oaths of compurgators.

During the age of Bracton, the defendant, who was incarcerated in jail and attempted to deny the obligation for his board and lodging, by the wager of law, was held incompetent to wage his law, in such a case, because it was counter to reason to permit one to be thus defeated of an obligation which he had recognized, based upon feelings of common humanity.

In this opinion of Lord Hort, it was counter to his idea of right, in the case of *London vs. Wood*,⁷⁷ to permit the wager of law, to avoid an obligation which was not merely secret, but notorious and where the recognition of the right to wage law, would result in a wrong upon the other party. The real reason for this limitation of the right, however, was that the procedure itself was wrong and the common sense of the nation was becoming aware of the fact and thus the courts for one reason or another, reached the conclusion that this or that case was not one wherein the right could be recognized, when, as a matter of fact, with the growing popularity of the right of trial by jury, this old procedure was eternally at war, since the former institution was based upon the disinterested judgment of impartial men, who were assembled to carefully weigh the issues and pass judgment according to the right, whereas, in the other procedure interested men, through

⁷⁷ 12 Mod. 669.

the influence of friendship or other ties, were led to approve the course of a neighbor or a friend, however wrong his object might be, and assist him by the corroboration of his oath.

A century after this leading case of *London vs. Wood*,⁷⁸ however, in which Lord Holt and Baron Hattisell differed as to the reasons why the right to wage his law should be denied to the defendant in that case, the right was recognized in England, although not expressly enforced by the court. In 1805, the case of *Barry vs. Robinson*,⁷⁹ came before the English Court of Common Pleas and the Counsel for the plaintiff in his presentation of his client's cause before the court, said: "If a man were now to tender his wager of law, the court would refuse to allow it," as the counsel considered that this procedure was entirely obsolete at that period. But the reporter of this case, however, advises us that to this statement of counsel, the court demurred, or, in the language of the Reporter, "This was denied by the court."

The last recorded case wherein this old defense was attempted in England was in the year 1824, in the case of *King vs. Williams*,⁸⁰ but as Professor Thayer observes, in his "*Older Modes of Trials*,"⁸¹ the wager of law at this time was "a discredited stranger, ill considered." This was an action of debt, upon a simple contract, a case wherein the wager of law clearly applied, under the old practice. The defendant pleaded

⁷⁸ 12 Mod. 669.

⁷⁹ I. B. & P. (N. P.) 297.

⁸⁰ 2 Barnew & C. 538; 4 D. & R. 3.

⁸¹ V. Harvard Law Review; II. Essays in Anglo-American Legal History, 391.

"nil debet per legem." Counselor Langslow appeared for the defendant and after filing this plea, asked the court to assign the number of compurgators, for the reason that "The books leave it doubtful and this species of defense is not often heard of now." This requested rule, to assign the number of compurgators to the defendant was refused by Abbot, C. J., who observed: "The court will not give the defendant any assistance in this matter. He must bring such number of compurgators as he shall be advised are sufficient." This, upon the theory that everyone is presumed to know the law and that the court would not assist a litigant in the perpetration of a wrongful act, although it might be presented in the robe of regularity, was good enough. But according to the ancient report of this case, even as Banquo's ghost dispelled the banqueters, when it was apparent to Macbeth's fervid imagination, so this recourse to the old obsolete wager of law, which allowed an adversary with his friends to swear his opponent out of court, caused the plaintiff in this case to abandon his cause, for we are advised that: "The defendant prepared to bring eleven compurgators, but the plaintiff abandoned the action."⁸²

Wager of law was several times invoked in the courts of the United States and we find that the Supreme Court considered the nature and limitations of the practice, as late as the year 1823, in the case of *Childress, plaintiff in error, vs. Emory and McCleur*,⁸³ wherein Mr. Webster, attorney for the plaintiff in error, in a suit on a note, urged before the court that

⁸² *King vs. Williams*, 2 Barnew. & C. 538; 4 D. & R. 3.

⁸³ 8 Wheaton, 642; 21 L. Ed. 705.

“The wager of law has ceased, but many rules of practice and pleading, founded upon it, have survived, and have become rules of property, which cannot be now safely disturbed. * * * On the English law, it is clear that debt cannot be maintained in this case, as the testator might have *waged his law*, which none can do who defend in a representative character; hence it is that in the case of simple contracts, debt has been superceded by the action of assumpsit, in which, as the testator could not have *waged his law*, his executor is not deprived of any defense which might have been used by the testator.”

To this argument, Mr. Hoffman, for the defendant in error, argued, *contra*, that:

“In an action of debt by a merchant stranger, on any species of simple contract, the defendant was not permitted to *wage his law*. Even in those early times, the courts were strongly disposed to rescue commercial transactions and dealings from this species of trial, as may be seen by the intended operation of the statute *de mercatoribus*, and particularly in the case of foreign creditors, who, it was presumed, could not so easily obtain the requisite evidence, of their claims as resident merchants; and this may be seen in Godfrey and Dixon’s case.”⁸⁴

And Mr. Justice Story, in disposing of the case, *inter alia* decided:

“Now, whatever may be said upon the question, whether the wager of law was ever introduced into the common law of our country by the emigration of our ancestors, it is perfectly clear that it cannot, since the establishment of the state of Tennessee, have had a legal existence in its jurisprudence. The constitution of that state has expressly declared, that the trial by jury shall remain inviolate; and the constitution of the United States has also declared that in suits at common

⁸⁴ Palmer’s Rep. 14; Fleta, 136.

law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. Any attempt to set up the wager of law would be utterly inconsistent with this acknowledged right. So that the wager of law, if it ever had any legal existence in the United States, is now completely abolished. If, then, we apply the rule of the common law, to the present case, we shall arrive, necessarily, at the conclusion, that the action of debt does lie against the executor, because the testator could never have waged his law in this case.''⁸⁵

And so Mr. Webster's defense of the *wager of law*, to this action on this note, was held not to obtain, and he lost his case and his client was adjudged to pay the note of his testator.

If true that but "a hair divides the false and true," it is little wonder that for centuries, in the struggle for right, immersed amid the darkness of the dawn of judicial procedure, an occasional false note should come down to us, through the centuries, from the pathetic drama wherein the individual was made to assert his right, upon the mere *wager of law*, instead of more

⁸⁵ 8 Wheaton, 675; 21 L. Ed. 713.

Compurgation was allowed in a charge of usury, by statute in Massachusetts, in 1783. (St. Mass. 1783, c. 55.) But in *Little vs. Rogers*, (1 Met. 108) Shaw, C. J., observes that the trial by jury has been "substituted for the old trial by oath."

Mr. Lea, in his excellent work, "Superstition and Force" (3 ed.) mentions the fact that in South Carolina, an act of the Legislature of 1712 mentions specific English laws as still in force and enumerates the law of compurgation, or wager of law, and that in Maryland, as late as 1811, Chancellor Kilty mentions the fact that wager of law has gone into disuse, because contrary to our spirit of law, but does not contend that it had then been specifically abolished, in Maryland. (Cooper's Stat. at L. of So. Car. Columbia, 1837, II., 403; Kilty's Report on English Statutes, Annapolis, 1811, p. 140; Lea, "Superstition and Force," p. 81.

accurate human standards to balance the scales of justice. Judged by our own environment, it seems that the quarrels of the Universe of old were gauged far too long by the erroneous standards used in the vain pursuit of This and That, about which the citizens of the past centuries endeavoured and disputed. And that with the institution of trial by jury, brought into existence in the middle ages, the *wager of law* would have much sooner become an obsolete form of procedure.

But in the continuance of the drama of human life, this prided institution of our twentieth century, may seem as crude and barbaric to the spectators viewing the show from the vantage of subsequent centuries, as this grotesque comedy of errors, known as the *wager of law* now appears to us, when we look back upon the judicial farce enacted by our ancestors, in the uncertain procedure of Law Wager. They seemed to wander "in and out, above, about, below," yet ever missing the door which led to the correct ideal. They labored under new and strange conditions, however, and perplexed as they were with the many problems of the Human and Divine and intermingling the processes and procedures of the lay and ecclesiastical courts, as they did, it is perhaps to their credit that the old tangles of the law were solved as creditably as they were.

However this may be, in the *Wager of Law* we have but another "story from of old," in connection with the perpetual struggle for right, which has followed man's course down through the successive generations of the past.

CHAPTER VIII.

BENEFIT OF CLERGY.

Engrossed as the profession is today with the agitation for the betterment of our remedial procedure, it will sometimes prove profitable to turn aside from the progress of our twentieth century procedure and entering the musty lumber-room of the law, brush aside the cob-webs and take a cursory view of some of the pleas that occupied the time of courts and lawyers of past centuries. Nothing is calculated to encourage more respect for the modern procedure of American and English courts, than reading the history of some of the unequal and unjust privileges and exemptions which obtained in the administration of the English law, until a comparatively recent date. The contrast is indeed striking, when we turn from the just ideals of equality and justice that characterize the remedial procedure of our day, to contemplate some of the customs and pleas that were followed and enforced by our own courts, before the evolution of our civilization had made the present ideals possible.

There is no doubt but that the English common law is the outgrowth of the most enlightened system of jurisprudence that the world has ever seen, for it represents the best thought of the brightest minds of civilization's most progressive people. Its rules and doctrines were formed, however, during the middle ages, and although it was generally consistent with the scholastic methods of thought that dominated the

thinking world of that period and for the most part, it was in thorough accord with proper and just ideals, yet, at the same time, the general doctrines and principles were applied along with many of the unequal proceedings and special pleas and privileges existing in favor of the higher classes and together with the extremely technical standards, that frequently were nothing but mere fantastic quibbles.

The benefit of clery is an illustration of the engraftment upon this enlightened system of jurisprudence, of one of the old special privileges of a favored class, who, as an incident and high prerogative of their office, claimed exemption from punishment for crimes. Of course such an exemption of a favored class was inconsistent with the object of distributive justice, to visit equal punishment upon all alike who are similarly situated and with the elevation of the standards of justice and equality, the plea was finally abolished by the legislative and judicial branches of Government in England and the United States.

The benefit of clergy, or *privilegium clericale*, was the exemption of the clergy from all responsibility to the temporal courts and laws from the punishment imposed for various criminal offenses. Originally the persons of clergymen alone were held to be exempt from criminal process before a secular judge, but the privilege was later extended by the law to all who could read, as all such were held to be *clerica*, or clerks.

For many centuries this plea was an important part of the criminal procedure of the continental countries of Europe and still furnishes a curious and instructive part of the history of the laws of England.

The privilege had its origin in a claim made by the ecclesiastics, at a very early period, for the entire exemption of their order from the jurisdiction of the common law courts of England. The growth and development of the privilege is an interesting chapter in the history of the controversy between the secular and spiritual power, during the middle ages and the limitation or expansion of the authority of the State or the Church, over matters temporal, depended largely upon the public sentiment that shaped the policies of the government and the weakness or strength of the individuals holding the reigns of government.

Benefit of clergy was the immediate outgrowth of conditions contributing to the growth of the English common law. Before the Norman conquest and afterwards, for many centuries, the clergy took a very active part in the legislation and judicial branches of government and they shaped the policies of the government, in many important respects. The educated class belonged to this profession and we owe it largely to them that the Anglo-Saxon law has left us any evidences at all. During the Saxon period of superstition and ignorance, the ecclesiastical power had the ascendancy, but it gradually declined, as intellect and education became the common property of the masses. Bishops were then the principal members of the courts of law and they instructed the judges in both the spiritual and secular laws and the respective limits upon each.¹ The question of ecclesiastical or lay jurisdiction gave rise to the most intense jealousies and contests between sovereigns and archbishops and lawyers,

¹ Bracton, Ch. XII., fol. 409.

but the superior learning of the clergy resulted in a gradual encroachment by the Church upon the powers of the State.² During the reign of Henry II., the jurisdiction of the king's court over criminal clerks was the subject of a memorable quarrel, between king Henry and Thomas a' Becket.³ Boniface, Archbishop of Canterbury, as the successor of Becket, waged a continuous fight, during the reign of Henry III., to establish and enlarge the power of the Church, over matters secular, when clerks or churchmen were brought before the secular courts. He ordained, under the authority of a convocation, in 1261, that archbishops, bishops and other inferior churchmen should ignore the letters of the king, calling them for trial before secular courts,⁴ and before this, in 1253, with other bishops, he pronounced a sentence of excommunication against all those who had violated similar provisions of the canonical laws, while enforcing secular power.⁵

In this civilized age, it seems strange that the Church would so dominate the State, since the State must have consented to such a power, or it could not have existed; but the Church, in this superstitious period of mankind, held the terror of excommunication over the heads of the temporal authorities and the State was thus coerced into the gradual consent to the domination of the spiritual authorities. The Church always claimed

² Glanville, lib. V. c. VIII., IX.

³ Maitland, Henry II. and Criminous Clerks, E. H. B. vii 224; I. Pollock and Maitland's History Eng. Law, p. 447.

⁴ II. Reeve's History English Law, p. 341.

⁵ Bracton, De Legibus, lib. V. c. XI., XII.; II. Reeve's History English Law, p. 344.

exclusive jurisdiction over all spiritual offenses, and as it held the unfettered power of excommunication, even though its degrees were opposed to secular laws, those around whom the Church threw its protecting arms were really held to be above and beyond the power of the secular courts.

The power of the Church was based upon a theory of Divine Right and it was claimed to be far nobler than that of the State, because, whereas, the power of the Pope extended to the soul, itself, the power of Princes was limited to the body alone. The power of the Church, being thus *jure divino*, ought to have been limited, at all times, to matters spiritual, but by a gradual encroachment and by compact with the powers of the State, the Church also assumed to exercise authority over bodies by the aid of the State. But notwithstanding the firmness with which the clergy claimed the exemption from all secular interference for the persons of clerks, and the general indulgence that the laity gave to this claim, confirmed, as it was by solemn declarations and acts of Parliament, the privilege was always viewed with more or less jealousy and considered as a usurpation that was generously tolerated rather than as a part and parcel of the established common law of England.⁶

Under the terms of the canonical decree, "No power was given to laymen to judge God's anointed,"⁷ because laymen, instead of possessing power to command, were under the Divine injunction to obey the Church and Churchmen. The clergy was not without a notable

⁶ III. Reeve's History English Law, p. 196.

⁷ Decret, lib., 1, tit. 10; III. Reeve's History English Law, p. 348.

precedent for this position, for it was recorded that king Alfred had a judge hanged who had executed a clerk, because as a secular judge, he must have known that he had no power over clerks.⁸

Churchmen also found many Bible references as authority for the privilege. In King David's psalm of praise, he cautioned his subjects:

"Be ye mindful always of his covenant, and the word which he commanded to a thousand generations;

Even of the covenant which he made with Abraham and of his oath unto Isaac;

And hath confirmed the same to Jacob for a law, and to Israel for an everlasting covenant:

He suffered no man to do them wrong; yea, he re-proved kings for their sakes,

Saying, *Touch not mine anointed, and do my prophets no harm.*"⁹

One guilty of the crime of high treason was not entitled to clergy and the exemption was not granted to those convicted of ordinary misdemeanors.¹⁰ A clergyman was exempted from capital punishment *toties quoties*, as often as he repeated the same offense; for a second, although it might be a wholly different offense, he was hanged. But of the laity, peers and peeresses were discharged for the first offense, without reading, while commoners, of the male sex, who could read, were branded in the hand and women commoners were held not entitled to clergy.¹¹ Nuns, however, were held entitled to their clergy, at an early day, the same

⁸ Mirror, c. V.

⁹ 1 Chronicles, XVI. 15, 22; Also, 1 Kings, XXVI. 9; II. Kings, I. 16.

¹⁰ 1 Chitty, Criminal Law, 667, 668; 1 Bishop's Criminal Law, Secs. 622, 624; 4 Bl. Comm. ch. 28.

¹¹ Bouviers's Dictionary, tit. Benefit of Clergy.

as the monks and other churchmen, but the privilege, in contemplation of the law, enured for the benefit of the church and not for the nun.¹²

As the privilege was enforced in more recent times, after conviction and any time before the execution of the sentence, when the clerk claimed his clergy, a priest or ordinary would present him with a "psalter," and if he could read his "neck-verse," he was burned in the hand and discharged. The first verse of the 51' Psalm was the verse most generally read to test the learning of the prisoner and this verse was therefore called a "neck-verse," because it decided the fate of the person claiming clergy, and the neck of the unfortunate called upon to read this verse depended upon his ability to read it.¹³ The rule of law governing the ordained clerk was that he could not be tried in the lay courts at all, but only in an ecclesiastical court and his punishment was governed entirely by that court. In Bracton's time, even before conviction in the secular court, the clerk was delivered when demanded by the bishop's court.¹⁴ But before the end of the reign of Henry III. the accused was not delivered until after his conviction.¹⁵

In the time of Edward III., the recognition and enjoyment of the benefit of clergy, depended entirely upon the ordinary demanding the felon as a clerk from the

¹² II. Hale's Pleas of Crown, 328, 371; I. Pollock and Maitland's History English Law, p. 445. By a curious combination of terms, some of the old cases refer to the exemptions women in pregnancy enjoyed in the law, as "Clergy of the belly."

¹³ Webster's New Int. Dict; Murray's English Dict., "Neck-verse."

¹⁴ Bracton f, 123b; I. Pollock and Maitland's History English Law, p. 442.

¹⁵ Coke, 2 Inst. 164.

secular authorities.¹⁶ In the reign of Edward IV., if the ordinary refused a man his clergy, where he was able to read, the cause was certified to the King's Bench, and the ordinary was fined, on the theory that he was only a minister of the secular court and not a judge in the cause.¹⁷ And during the same reign, if the ordinary granted clergy to a felon who could not read, the ordinary was fined and the convict hanged and the secular courts assumed the right to judge of the ability of the prisoner to read, for they made the record, "*quod legit ut clericus, ideo tradator ordinario*" and if the ordinary granted clergy to one who could not read, or refused it to one qualified, he was fined.

But the qualification as to reading was not strictly applied at this period, for if the prisoner could spell and thus put syllables together, he was held, by Fortescue, to be entitled to his clergy. Littleton said that if the clerk refused generally to read, he was denied his clergy; but if a cause were stated which could not be allowed by the law of the land, as where he had not the *tonsura clericalis* or *ornamentum clericale*, if clergy were refused, the ordinary was fined and enjoined to receive the felon.¹⁸

During the reign of Edward IV. the prisoner claimed his clergy, upon his arraignment, but this was deemed

¹⁶ III. Reeve's History English Law, pp. 197, 198.

¹⁷ IV. Reeve's History English Law, p. 59.

¹⁸ 9 Edward IV. 28.

Kelying reports a case, where at the Lent Assizes, for Winchester, the clerk appointed by the bishop to give clergy for the prisoners, charged with larceny, delivered the book to the prisoner and the prisoner did not look at the book at all, but when asked, "*legit or non-legit*," the clerk replied "*legit*." The court then bid the clerk of assizes not to record that the prisoner read, and fined the bishop's clerk for so finding. (18 Car. II.)

prejudicial to the prisoner, for he thus had no challenges and was denied the right to a trial on the merits and even if innocent of the crime, if he could not read, was hanged, and his estate was forfeited. Sir John Priscott, Chief Justice of the Common Pleas Court, during the reign of Henry VI. changed the practice and when the felon claimed his clergy, on arraignment, he was required to plead to the merits and then, if convicted, the crown took his estate by forfeiture and he was then allowed his clergy. This practice served the double purpose of giving the prisoner the benefit of a trial on the merits and giving the crown a chance at his estate, which the other practice denied to the crown and hence, it was afterwards generally followed.¹⁹

It was customary to keep a register of clerks-convict and persons attainted, so that such persons might not have their privilege more than once.²⁰

The burning in the hand, which was a necessary part of the procedure of the privilege of clergy, was not ordained by the statute (IV. Henry VII.) as a punishment, but merely to enable the court, on a subsequent arraignment of the offender, to ascertain if the defendant had been accorded his clergy. By statute, during the reign of Elizabeth (18 Elizabeth), it was enacted that the prisoner should not be delivered until he had been burned in the hand, and in Biggen's case, near the end of the reign of Queen Elizabeth, it was decided, notwithstanding the statute referred to, that the Queen could pardon the burning in the hand, but unless she had done so, the prisoner could not be discharged until

¹⁹ Littleton, 2 Inst. 164; IV. Reeve's History English Law, p. 60.

²⁰ IV. Reeve's History English Law, p. 466.

he had been burned in the hand, and must remain perpetually in prison.²¹

The case of one Stone, originating during the fourth year of the reign of Queen Elizabeth, is interesting as showing the effect of clergy upon crimes committed preceding the granting of clergy to the criminal. Stone had committed two felonies in one day, one of which was clergyable and the other not. He was first indicted upon the crime which was clergyable and being found guilty, was admitted to clergy and the judgment was recorded. Having been adjudged guilty at a subsequent session upon the non-clergyable felony, the conviction on the clergyable offense was set up in bar and was held to be good, by a divided court, seven of the thirteen deciding that since he had been once placed in jeopardy, it should not be presumed that the felony for which clergy was not admissible was committed before the other and *in favorem vitae*, the most merciful side should be taken and though the felony upon which he was convicted last was committed after the other one, yet since the felon had suffered judgment upon the former conviction, as a clerk convict, he should not be arraigned upon the second indictment, because the effect of the discharge on the conviction was to acquit him of all felonies committed before the conviction, as he should have been arraigned for all his offenses before his clergy was allowed and the court would be presumed to have had them in mind, as this was the duty of the court, and the effect of his clergy was to discharge him of all preceding felonies.²²

²¹ 5 Eliz. Dyer, 50; V. Reeve's History English Law, p. 346.

²² V. Reeve's History English Law, p. 345.

The judgment of the court, in Stone's case, as to the effect of clergy upon a preceding crime, was followed in an early North Carolina case,²³ where the court held that if the defendant claimed clergy for an offense committed before clergy was granted to him, this claim should be urged the same as a pardon, when the prisoner was brought up for judgment on the latter conviction.

The distinction between "clergyable" and "unclergyable" crimes was not so clearly defined during the thirteenth century, as at a later period. At this time the benefit of clergy was but the privilege of "ordained clerks" and the legislation of king John's reign shows that the exemption was slowly and by degrees ordained as not applicable to the crime of high treason.²⁴ While the exemption to the clerks of the twelfth century was much broader than later, during the thirteenth century clerks could be tried for all minor offenses and in Bracton's day clerks were answerable to civil process the same as the laity.²⁵ The clergy had so far established the exemption of their persons from corporal pains, that during the reign of Henry III. it was enacted that a clerk, taken for the death of a man, or for any other crime, if demanded by the ordinary, was to be immediately delivered, without inquisition, to the court Christian, to make canonical purgation and to establish his innocence or stand convicted.²⁶

During the reign of Edward I., the practice estab-

²³ State vs. Carroll, 27 N. C. (5 Ired.) 139.

²⁴ II. Pollock and Maitland's History English Law, p. 501.

²⁵ Bracton, f. 401b; I. Pollock and Maitland's History English Law, p. 130.

²⁶ II. Reeve's History English Law, pp. 421, 422.

lished during the reign of Henry III., that a clerk, convicted of felony, could be delivered to the ordinary, was recognized by act of Parliament (Statute Westminster), and this statute recited this privilege and simply admonished the prelates not to liberate those so delivered to them, without putting them to their canonical purgation.²⁷ In the 25' year of Edward III. the clergy complained to Parliament that a certain knight, entitled to clergy, had been hanged and quartered, on a judgment of treason and that a priest had been hanged for killing his master. These complaints led to the enactment of the statute *De Clero* (25 Edward III. st. 3) by the terms of which it was provided that henceforth all manner of clerks, as well secular as religious, convicted before any secular justice, for treason or felony, touching other persons than the king himself or his royal majesty, should freely have and enjoy the privilege of the holy church and should, without any impeachment or delay, be delivered to the ordinary demanding them.²⁸

During the reign of Henry VII. (7 Henry VII., c. 1), the benefit of clergy was taken away from persons convicted of desertion while under enlistment as soldiers of the crown and the privilege was likewise taken away from those convicted of petit treason. The exemption of the clergy from punishment for crimes was given a most decided set-back by the statute 4' Henry VIII., c. 2, which provided that:

“All persons committing murder or felony, in any church, chapel, or hallowed place; or who, of malice prepens, rob or murder any person in the king's high-

²⁷ II. Reeve's History English Law, p. 573.

²⁸ III. Reeve's History English Law, p. 197.

way, or rob or murder any person in his house, the owner or dweller of the house, his wife, child or servant being then therein, and put in fear or dread, shall not be admitted to clergy.”

This statute contained no exception of those actually engaged in the holy orders and this led to the most determined resistance on the part of the clergy of the kingdom.²⁹ Henry VIII. stood firm, however, and during the same reign another statute was passed (23 Henry VIII., c. 1), taking away the benefit of clergy from persons convicted of petit treason, wilful, malicious murder, robbery, wilful burning of a dwelling house, or barn, where grain or corn was stored, and the like privilege was denied to the abettors, helpers, maintainers or counselors of such felons, except only such as were within the holy orders. It was also made a felony, without clergy, for a clerk convict to break prison and escape, and this was a serious blow to the exemption, for though the lives of the clergy were spared, after conviction of the offenses named, yet they were to be condemned to imprisonment and even to death, if the ordinary so directed.³⁰

By 27 Henry VIII., c. 17, clergy was also taken away from servants who embezzled their master's goods or property, and by 28 Henry VIII., c. 1, persons under holy orders were to be judged the same as those not under holy orders, so that real clerks were subjected to capital punishment for felony, the same as nominal clerks.³¹ During the same reign, by statute 33 Henry

²⁹ IV. Reeve's History English Law, pp. 458, 463.

³⁰ IV. Reeve's History English Law, p. 466.

³¹ IV. Reeve's History English Law, p. 468.

VIII., c. 1 to 14, clergy was denied to persons practicing witchcraft or enchantment and to those making prophesies upon coates of arms, badges, etc.³² Before the reign of Elizabeth, the granting or recording clergy had been reduced to a mere formality, but by 18' Elizabeth, it was provided that the temporal courts should not deliver the prisoner, until he had been burned in the hand.³³

Benefit of clergy was not abolished, in England, until the year 1825, when, by statute, 7 George IV., c. 28, sec. 6, this ancient privilege of the middle ages was abolished, in that country.

In the United States, by Act of Congress, April 30', 1790, it was provided that the benefit of clergy should not be allowed upon conviction for any crime where, by statute, the punishment was death. In North Carolina, in 1816, the punishment by burning in the hand was abrogated, and, in Kentucky, the benefit of clergy was abolished, by statute, in 1847.³⁴

The celebrated case of Doctor Horsey, Chancellor to the Bishop of London, who, during the reign of Henry VIII., was prosecuted and adjudged guilty of the murder of John Hunne, is one of the most interesting that has come to the writer's attention. On account of the well known position of Doctor Standish, as an advocate of the temporal power, the clergy concluded not to wait upon the procedure of the temporal courts, in Doctor Horsey's case, but they caused a charge of heresy to be lodged against Doctor Standish,

³² IV. Reeve's History English Law, p. 468.

³³ V. Reeve's History English Law, p. 346.

³⁴ American Com. Kentucky, p. 407.

because of his advocacy of the power of the temporal courts over the persons and punishment of clerks. The clergy and the justices of the King's Courts had a notable dispute concerning the power of the temporal courts over the persons of clerks, the clergy contending that the benefit of clergy was established by the express command of Jesus Christ, in the words, *nolite tangere Christos meos*, while the temporal justices argued that these were the words of King David, not of the Saviour at all, and that the "anointed," referred to the believers, to distinguish them from the unbelievers, then abroad in Palestine. Those who had proceeded against Doctor Standish were adjudged guilty of a *praemunire*, when Cardinal Wolsey threw himself at the king's feet and beseeched him to withhold his decision until the Pope could be heard from. King Henry, however, decided that the arguments of the supporters of Doctor Standish had not been answered by the clergy and concluded with all of his accustomed firmness:

"By the order and sufferance of God, we are king of England; and the kings of England who have gone before us never had any superior but God alone; and, therefore, know that we will maintain the right of our crown and temporal jurisdiction, as well in this point as in others, in as ample a manner as our predecessors have done before us."³⁵

This decisive stand of the King concluded the agitation concerning the conflict of authority over the case of Doctor Horsey. Doctor Standish was discharged from the charge of heresy. Doctor Horsey was so far rescued from temporal power, however, that he en-

³⁵ IV. Reeve's History English Law, pp. 458, 462; Kielw. 180b, to 185b.

joyed the free custody of the house of the Archbishop of Canterbury, until the popular clamor had subsided, when he was privately surrendered to the court of King's Bench and having entered a plea of not guilty, it was confessed and the defendant was discharged.³⁶

Although the clergy thus failed to convince Henry VIII. of the true foundation of its power, in the case of Doctor Standish, it lost none of its authority against the temporal courts, in the case of Doctor Horsey, but its jurisdiction and the benefit of clergy was practically conceded by the judges of the king's court and the privilege continued to be recognized until the 23' year of this king's reign, when he waged war against the whole papal authority and passed an act taking away the benefit of clergy from murder and robbery, in certain cases.³⁷

One of the most distinguished men known to have been accorded the benefit of clergy, in England, was the gifted Ben Jonson, the friend of "gentle Shakespeare" and the scholarly Lord Bacon. He was arraigned at the Old Bailey, in October, 1598, for the manslaughter of Gabriel Spencer, in a duel. The indictment charged that the defendant, at Shordiche, had, "with a certain sword of iron and steel called a rapiour, of the price of 3s., which he then and there had in his right hand and held drawn, feloniously and wilfully struck the same Gabriel then and there with the afore-said sword, giving to the same Gabriel Spencer, in and upon the same Gabriel's right side a mortal wound, of the depth of six inches and of the bredth of one inch,

³⁶ Keilw. 180b, to 185b; IV. Reeve's History English Law, pp. 458, 462.

³⁷ IV. Reeve's History English Law, p. 463.

of which mortal wound the same Gabriel then and there died instantly.”³⁸

The record in this same case further shows that the prisoner when arraigned,

“Confessed the indictment, asked for the book, read like a clerk, was marked with the letter T, and delivered according to the form of the statute,”

which meant that the author of “Every Man in His Humor” had claimed and been accorded the benefit of clergy; that he had been branded on the left thumb with a T, generally known as the Tyburn T, and discharged.³⁹

The benefit of clergy was set up and recognized in many criminal cases in the United States, during the Colonial period and the great patriot, James Otis, successfully urged the exemption in favor of Massachusetts soldiers, convicted of murder for their participation in the Boston massacre.⁴⁰ The Federal Court decided, in the year 1817, in the case of *United States vs. Lambert*,⁴¹ that a person convicted of bigamy, in Alexandria, was entitled to clergy, and, if able to read, should be burned in the hand and recognized for good subsequent behaviour. In the year 1830, the Federal Court held, in the case of *United States vs. Jernegan*⁴²

³⁸ This original old musty indictment was recently unearthed at the old Sessions House, in London, by a representative of the *London Globe* and was delivered to the Council of Middlesex county for preservation.

³⁹ It is reported that the wily Ben really bribed the jailer to use cold steel in branding him, as no marks were found on his hand after his death. (*London Globe*, April, 1910.)

⁴⁰ *American Commonwealth*, Massachusetts; Knapp’s “Sketches of Eminent Lawyers,” etc.

⁴¹ 2 Cranch, C. C. 137.

⁴² 4 Cranch, C. C. 118.

that on a conviction for bigamy, in granting the benefit of clergy, it was discretionary with the trial court to dispense with the burning in the hand.

In the year 1806 the Supreme Court of North Carolina held that females could claim the benefit of clergy, the same as males.⁴³ The Legislature of North Carolina, having, in 1816 passed a statute abolishing the punishment of "burning in the hand" for clergyable felonies, the Supreme Court of that state, construing this statute, in 1825, in the case of *State vs. Yeater*,⁴⁴ held that corporal punishment and imprisonment could not both be inflicted upon a person found guilty of the crime of manslaughter.

In 1837, however, in the same state the same court held that one found guilty of manslaughter could be burned in the hand and also imprisoned for one year. And in the year 1855, the Supreme Court of North Carolina held that when a new felony was created by statute, the privilege of clergy was an incident thereto, unless it was expressly taken away by the statute creating the offense.⁴⁵ And in *State vs. Carroll*,⁴⁶ the same court held that when the defendant prayed the benefit of clergy, for a clergyable offense, if the State objected because the defendant had before had clergy, this objection must be set up by a plea in writing.

In *State vs. Sutcliff*,⁴⁷ decided in South Carolina, in 1855, a defendant, convicted of burning a dwelling

⁴³ *State vs. Gray*, 5 No. Car. (1 Murph.) 147.

⁴⁴ 11 No. Car. 4 Hawks. 187. And see, also, *State vs. Kearney*, 8 No. Car. 1 Hawks. 53.

⁴⁵ *State vs. Bosse*, 8 Rich. Law. 276.

⁴⁶ 24 No. Car. 2 Ired. 257.

⁴⁷ 4 Suab. 372.

house, was held entitled to the benefit of clergy, and in the same state, the same year, another person convicted of arson in the nighttime, was held entitled to clergy.⁴⁸

In Indiana, in 1820, and in Minnesota, in 1859, the Supreme Courts of those states held that the benefit of clergy did not and never had existed in those commonwealths,⁴⁹ and in the year 1787 the Supreme Court of Virginia held that the crime of arson was not a clergyable offense in the courts of that state.⁵⁰ But in the same state, in 1795, two persons were convicted for stealing a horse, in 1793, and before the *sentence of death* was pronounced, they both prayed the benefit of clergy and the Supreme Court held that they were entitled to clergy.⁵¹

One of the last cases where clergy was recognized, in the United States, was in a Kentucky case.⁵² A negro was convicted of rape upon a white woman, after a trial had before Judge Buckner, in Bonner County, at Glasgow. Under the statute, the punishment to be assessed was death and the judge believed the defendant innocent of the crime for which he had been convicted. The defendant's counsel claimed the benefit

⁴⁸ State vs. Bosse, 8 Rich. Law. 276.

⁴⁹ Fuller vs. State. 1 Blatchf. 63; State vs. Bilansky, 3 Minn. 246; 1 Gil. 169.

⁵⁰ Commonwealth vs. Posey, 4 Coll. 109; 2 Am. Dec. 560.

⁵¹ Commonwealth vs. Stewart, 1 Va. Cas. 114.

⁵² American Com. Ky. p. 407. Ch. 21.

That Thackeray was thoroughly familiar with the law governing the Benefit of Clergy and the nature of the punishment inflicted on the culprit pleading guilty of an offense clergyable at common law, is evidenced by his presentation of the plea in favor of Lord Mohun, the Earl of Warwick, Col. Westbury and Henry Esmond, in his interesting plot, in "Henry Esmond."

of clergy for him and the defendant was found able to read the Constitution of the United States and he was accordingly burned in the hand and discharged.

These instances are not nearly all that could be found in England or the United States to illustrate the application of this exemption from crime, at common law, but the random cases mentioned will show the general recognition of the privilege until comparatively recent times.

There is no doubt but what the benefit of clergy bred much crime and operated, for centuries, as a great impediment in the impartial enforcement of the criminal laws of England and the United States. Like the right of sanctuary, established by the early Saxon kings, the benefit of clergy owed its existence to the fact that the law's redress of wrongs was, at an early period in the history of the world, inadequate to protect the educated class from the ambition and cupidity of the race and in the dangerous games for place and power then waged, these privileges were very dear to Englishmen and on the whole, were strictly respected.

Judged by modern standards, the exemption of the clergy, enlarged to include all those who could read, from the punishment that others, similarly situated, were subjected to, who were not so fortunate as to be able to read, seems an anomaly in the administration of any system of justice; but it must be accepted as a mere incident of the barbarous period when the privilege was applied.

As a doctrine of the common law, it illustrates the fallibility of all institutions of man, both in and out of the holy orders. The privilege had neither justice nor

reason for its foundation, but, like the practice of witchcraft, enchantment and the belief in ghosts, so prevalent during the same period, it owed its existence to the ignorance and superstition of that civilization. Because of such an unjust practice the common law is not to be condemned, any more than is the literature of the same period of English history, because of the introduction of ghosts, witchcraft and enchantment, into the literary masterpieces of the past centuries, for these beliefs were prevalent at that time.

The Benefit of Clergy was an institution of the "myriads who, before us, pass'd the door of darkness through." No doubt some of our institutions and procedure, to the jurists of succeeding ages, that come and go, "upon this chequer-board of nights and days," will seem equally as unjust and ridiculous as this institution of the past now appears to us. We should congratulate ourselves, that with our own liberal constitution, founded upon a more exact idea of distributive justice, we are able to "grasp this sorry scheme of things," which existed until the present century. But that this institution continued until the past century, ought to prevent our entire satisfaction with our own procedure, and urge us to the improvement of our present laws.

CHAPTER IX.

PRIVILEGE OF SANCTUARY.

The privilege of sanctuary, sometimes called the privilege of asylum, was the exemption afforded criminals, taking refuge in certain consecrated places, from the ordinary operation of the law of arrest.

The institution is no doubt older than the time of Moses and we find frequent references to it in the early books of the Bible.

In the book of Exodus the old Mosaic law was stated to be: "He that smiteth a man, so that he die, shall be surely put to death," but in the same book, it is written: "And if a man lie not in wait, but God deliver him into his hand; then I will appoint thee a place whither he shall flee."

Moses' law thus distinguished between murder on malice aforethought and mere manslaughter, as we call it and according to the ancient law of the Israelites, there were cities of refuge to which a felon might flee, who killed a man unawares.

Moses appointed six cities of refuge, three "on this side of Jordan" and three "in the land of Canaan," in order that the slayer might flee thither which should kill his neighbour unawares, and hated him not in times past; and that fleeing to one of these cities, he might live."¹

¹ The six cities appointed in the book of Numbers were only for those who "killeth any person unawares." (xxxv.)

Deuteronomy refers to the case of "the slayer which shall flee thither that he may live"; distinguishing the man who lies in wait, from the man who "killeth his neighbour innocently, whom he hated not in times past."²

In the book of Joshua it is provided that "When he that doth flee to one of those cities shall stand at the entering of the gate of the city, and shall declare his cause in the ears of the elders of that city, they shall take him into the city unto them and give him a place, that he may dwell among them. And if the avenger of blood pursue after him, then they shall not deliver the slayer up into his hand; because he smote his neighbour unwittingly and hated him not beforetime."³

Over a thousand years before Christ we find Adonijah claiming the privilege of sanctuary to protect him from the wrath of Solomon, for it is recorded in the first book of Kings:⁴

"And Adonijah feared because of Solomon, and arose, and went and caught hold on the horns of the altar. And it was told Solomon, saying, Behold, Adonijah feareth king Solomon, for, lo, he hath caught hold on the horns of the altar, saying: Let king Solomon swear unto me today that he will not slay his servant with the sword. And Solomon said: If he will shew himself a worthy man, there shall not an hair of him fall to the earth; but if wickedness shall be found in him, he shall die."

² Chapter XIX. 4.

³ Joshua, XX. 4, 5.

"These were the cities appointed for all the children of Israel, and for the avenger that sojourneth among them, that whomsoever killeth any person unawares, might flee thither, and not die by the hand of the avenger of blood, until he stood before the congregation."
idem. 9.

⁴ Chapter, I., 50, 52.

This case of Adonijah taking refuge in the temple, at the altar, as a protection against the supposed wrath of Solomon, is nothing more nor less than a claim of sanctuary, for even the hand of Solomon was stayed at the threshold of such a consecrated place and the sinner taking refuge at the altar was supposed to be surrounded by the protecting mantle of the Great Jehovah. This is only one of many thousand similar concrete cases that could be mentioned, no doubt, if the unwritten history of the unnoticed millions of patriarchial days could be known, for the right of sanctuary obtained generally in those ancient days. The ever-flowing flood of time has swept away all records of the ordinary mortals, however, and only the great peer out through the darkness of the past.

The conditions upon which sanctuary was bestowed, in the ancient days of the patriarchs was that the refugee should not quit the city of refuge until the death of the High Priest, for on this solemn occasion, the great public grief was supposed to over-shadow all merely private affairs. As recorded in the book of Joshua, one claiming sanctuary must stand at the gate of the city and "declare his cause in the ears of the elders"⁵; the elders tried his case, to ascertain if he were guilty of malicious murder, or mere manslaughter, and if the case of murder was established by the "avenger of blood," who acted as prosecutor, the criminal was given up, even though he clung to the altar,⁶

⁵ Joshua, XX., 4, 5.

⁶ I. Kings, 1, 50, 51.

Nimrod, on the death of his eldest son, erected a golden statue of him in his palace and ordained that all criminals fleeing thither should be protected and this was a species of sanctuary. The Green Bag, vol. VIII., 1896, p. 422.

but if the elders found that he was not guilty of wilful murder, he was retained as "a prisoner at large" in the city of refuge, until the demise of the High Priest, when he was allowed to return to his home, duly purged of the crime for which he had fled. If he departed from the "city of refuge" before the death of the High Priest, however, he was regarded as an outlaw and could be slain by any man, as such.⁷

According to Plutarch and Dr. Pegge, the right of sanctuary was recognized among the ancient Greeks and the Oratory of Theseus was one of the places of refuge for persons of lowly station, who fled to avoid the oppression of the great and powerful "avengers of blood." The privilege afforded these lowly ones soon became a license for the protection of criminals, however, and the most notorious criminals were protected from the civil authorities and the holy places and temples came to be used as asylums and resorts for the most notorious criminals.⁸

From Greece, the right of sanctuary spread to Rome, and although, by the Roman law, murderers, escaped slaves, robbers, and public debtors were excluded from sanctuary privileges,⁹ in the course of time, the priests refused to deliver up the slaves to their masters, the debtors to their creditors, or the murderers to the magistrates, and the temples and churches became regular dens for thieves, murderers and criminals of the worst kind.¹⁰

Long after the civilizations of the ancient Jews and

⁷ Chambers Journal, vol. 44, Jan.-June, 1867, p. 170.

⁸ The Green Bag, vol. 8, 1896, p. 423.

⁹ Chambers Journal, vol. 64, p. 513.

¹⁰ Plutarch, Dr. Pegge; Green Bag, vol. 8, 1896, p. 423.

Grecians had passed away, the privilege of sanctuary, which they recognized, was perpetuated in various forms, and in most of the later civilizations we find evidences of similar customs obtaining.

Before the privilege of sanctuary was guaranteed by written statute law, the right was recognized by the general usage of the Christian church, in accordance with the early Mosaic law and in all the countries whose civilization borrowed from the ancient Israelites, there is evidence of such a custom.

The Emperor Constantine, as early as the year 324 caused laws to be enacted, extending and recognizing the privilege of sanctuary; Theodosius, in the year 392, made a law regulating the exemption to criminals of his day and Theodosius II. extended the freedom of sanctuary, from the altar and body of the church itself, to which it was previously confined, to all the buildings and places contained within the outer walls of the consecrated places, set apart for purposes of sanctuary.¹¹

Although the fact is not established by competent authority, it has been stated that the privilege of sanctuary obtained in England, as early as the close of the second century after Christ.¹² The right may have been recognized as early as this date, but the history of the period does not give us any very authentic record to sustain that it did. Soon after the conversion of the Saxons to Christianity, however, all places of public worship were looked upon as so consecrated that

¹¹ Chambers Journal, vol. 64, p. 513. Papal sanction was expressly given in the year 620. *ante idem*.

¹² Chambers Journal, Vol. 64, August, 1887, p. 512.

criminals taking refuge in any of them were temporarily protected from the process of the civil authorities.¹³

Unlike the ancient Jews, the early Saxons received even the felons guilty of wilful murder, for a period of thirty days, if they paid the *Wehrgeld*, fixed by the officers of the church, according to the standing of the person killed; he was protected from the civil authorities for a period of thirty days, on payment of the *Wehrgeld*, if he provided his own sustenance, after which he was delivered to his friends.¹⁴

As sanctuary was only extended to those, under the Mosaic law, who "declared their cause in the ears of the elders of the city," so, under the Anglo-Saxon law, the criminal claiming sanctuary was required to confess his crime and declare that he sought the safety of the church to preserve his life.¹⁵

Under the old Saxon law, however, the privilege was not extended for a longer period than forty days and at the end of that time, if the prisoner did not *abjure the realm*, he was delivered to his friends, or to the civil authorities. Under the practice known as *abjuration of the realm* if the sanctuary felon, within forty days after taking sanctuary, went, in sackcloth, before the coroner and confessed his guilt and took an oath to quit the realm and not to return, without the king's license, he was then attainted of the felony, but was given an additional period of forty days to prepare for his

¹³ Chambers Journal, Vol. 44, June, 1867, p. 170.

¹⁴ *Ante idem*.

¹⁵ I. Reeve's History English Law, p. 198.

Reeves shows that at this early day the *pax ecclesiæ* was more sacred, before the law, than the *pax regis. ante idem*.

journey and to keep the privilege alive, he was compelled, within this period, to repair, with a cross in his hand, as an indicia of his crime, but an emblem of the protection afforded him by the church, to the port assigned him, and to there take his journey for some foreign shore.¹⁶

Large numbers of the English felons, at an early day, by this practice known as *abjuration of the realm*, were induced to leave England and annually many such "undesirable citizens" took passage from Dover, to France or Flanders, under the threat of delivery to the civil authorities, to answer for their crime, if they did not voluntarily assume this perpetual banishment and suffer the forfeiture of their estate to the crown.¹⁷

After *abjuration of the realm*, if the prisoner afterwards returned to England, without the license of the king, so to do, he was regarded as an outlaw and, when caught, was condemned to be hanged, unless he was a clerk, in which event, he was allowed to claim the *benefit of clergy*, and to be discharged, after the usual preliminaries and the punishment inflicted upon those claiming clergy for such a crime as the sanctuary criminal had committed.¹⁸

¹⁶ Reville, *L'Abjuration regni*, *Revue historique*, vol. 50, p. 1; M. Reville contends that the law of abjuration is purely an English institution and was adopted by the Normans, from the early Anglo-Saxons. See *Pl. Cr.* pl. 48, 49, 89; Britton, i, 63; *Leg. Edw. Conf.* c, 5.

¹⁷ II. Pollock and Maitland's *History English Law*, p. 590.

¹⁸ *Ante idem.*

Speaking of the practice known as *abjuration of the realm*, Pollock and Maitland, in their excellent history of English Law, say: "The coroner came and parleyed with the refugee, who had his choice between submitting to trial and abjuring the realm.

During the period of the forty days, while the criminal was enjoying his privilege of sanctuary, the *villata* where the crime was committed was required to watch the sanctuary, to prevent his escape, without *abjuration of the realm*; if the coroner did not come for the period of forty days, the township was required to watch the church for this full period and if the criminal escaped, because of the failure to do so, the township was amerced accordingly.¹⁹

The privilege of sanctuary was recognized by the code of Ina, King of West Saxony, in 693, and the fifth section of the code provides that if a felon, who had been convicted of a capital offense fled to a church, or sanctuary, his life should be spared and if any criminal adjudged to be flogged, sought refuge in such consecrated place, the stripes, that he would otherwise receive, should be withheld from him.²⁰

In the year 887, under a statute of Alfred the Great, the privilege of three nights was allowed the criminal seeking the protection of the church, to enable him to prepare for his safety, and by this same provision of the law, if anyone violated the privilege of sanctuary, during the period named, by inflicting blows, wounds, or bonds, upon the sanctuary criminal, he was obliged to pay the sum of One hundred and twenty shill-

If he chose the latter course, he hurried, dressed in pilgrim's guise, to the port that was assigned to him, and left England, being bound by his oath, never to return. His lands escheated; his chattels were forfeited, and if he ever came back, his fate was that of an outlaw." (Vol. II., p. 590.)

¹⁹ I. Pollock and Maitland's History English Law, pp. 565, 566; R. H. 1, 308; Maddox, Hist. Exch. i, 541, 568.

²⁰ Chamber's Journal, Vol. 64, 1887, p. 513; Green Bag, vol. 8, p. 423.

ings to the ministers of the church, whose precincts had been invaded.²¹

The Mirror of Justice, reports that King Alfred caused a judge to be hanged, who had invaded the jurisdiction of the holy orders and removed, by civil process, a criminal who had sought the protection of sanctuary²² and it is certain that the right was not only safe-guarded by the law, in the time of Alfred, but that Ethelred and all subsequent Saxon kings expressly sanctioned the privilege.²³

-With the advent of William the Conqueror, the law of sanctuary, with the other Saxon laws that he did not repeal, became more fixed and definite, but the extent of the privilege was more or less varied, by the laws or practices of the different subsequent kings.

After the conquest the practice obtained of erecting a stone seat, beside the altar and several of these seats were erected in the English churches, and criminals fleeing to these seats were protected by the peace of the church, *pax ecclesiae*, and guarded by all its sanctity. To violate the protection afforded by this seat, or of the shrine of relics, was an offense too grave to be compensated by the payment of a mere money fine. One of these seats of stone still remains at Beverly and another at Hexham.

The privilege at Beverly was granted by Athelstan and extended for a radius of a mile around St. John's as the center. The outward and next outer boundaries of this circle were designated by crosses of rich carving.

²¹ *Ante idem.* I. Reeve's History English Law, p. 198.

²² Mirror of Justice, c. 5.

²³ I. Reeve's History English Law, pp. 198, 199, note, Finlason's edition.

The third boundary began at the entrance to the church and the sixth embraced the high altar and the "fridstool."²⁴

In the four roads leading to the monastery of Hexham, in Northumberland, the boundary stones were rude crosses, around which, in Saxon characters and letters was the word "Sanctuarium," which meant so much to the criminals of early times, seeking the protection of the "Chair of Peace."

The "fridstool" at Hexham has been carefully preserved and is much more extensive and handsome than that at Beverly, as it has interlaced Saxon and Norman ornaments on the top of the chair and a moulding extends below and around the seat.²⁵

²⁴ This term is composed of the words "frith" and "stol," meaning "the seat of peace." It was a heavy stone chair, or seat and that at Beverly was devoid of decoration, but perfectly plain, in every particular. It has been broken and repaired with clamps of iron and we are informed that it formerly bore a Latin inscription, which stated that: "This stone chair is called Fridstool—that is, the Chair of Peace, to which what criminal soever flies to it hath full protection." Chamber's Journal, Vol. 64, 1887, p. 513.

Littell's Living Age, of July-Sept., 1907, Vol. 254, p. 700, produces a transcript of the register at Beverley, when one John Spret was entered as a sanctuary criminal, as follows: "John Spret, gentleman. Memorandum. That John Spret, of Barton, upon Umber, in the counte of Lyncoln, com to Beverlay, the first day of October, the vii year of the reen of Keing Henry the VII., and asked the lybertes of Saint John of Beverlay, for the death of John Welton, husbondman of the same town, and knowlig hymself to be at the kylling of the same John with a degart, the 15' day of August." And thus, this tragedy, which resulted in the death of husbandman John Welton, at the point of a dagger, in the hand of Mr. John Spret, has caused both of these gentlemen to be known in history after a period of many centuries, and this sad circumstance of their lives is quoted long centuries later, to illustrate the manner of an obsolete custom.

²⁵ Chamber's Journal, Vol. 64, p. 514.

At Durham, the privilege extended to the church, the churchyard and the circuit. All who came within this solemn circle were protected, for the church was supposed to throw around them its protecting arms and the penalties for intruding upon this "charmed circle," increased in proportion as the degree of holiness was desecrated.²⁶

William the Conqueror granted the charter to St. Martin's le Grand and by the charter the privilege extended not only to the church, but to the college of St. Martin and the precincts thereof.²⁷

Westminster, perhaps the most famous sanctuary in England, received its charters from two of the kings of the Heptarchy and Edward the Confessor attempted to forever establish it as one of the perpetual sanctuaries of England, for all classes of criminals, in the following broad grant:

"I order and establish, forever, that what person, of what condition or estate soever he be, from whence soever he come, or for what offence or cause it be, either for his refuge in the said holy place, he be assured of his life, liberty and limbs. And over this, I forbid, under the pain of everlasting damnation, that no minister of mine, or of my successors, intermeddle with any the goods, lands, or possessions of the said persons taking the said sanctuary. * * * And whomsoever presumes or doth contrary to this my graunt I will he lose his name, worship, dignity and power and that with the great traitor Judas, that betrayed our Saviour, he be in everlasting fire of hell; and I will and ordain that

²⁶ Violators of the first and second boundary were punished by a fine of eight pounds; the third space by double that sum; and so on, but if a person penetrated into the charmed circle of the altar, no fine could save him, but he was regarded as a "botelas" man. *ante idem*.

²⁷ Chamber's Journal, 1867, Vol. 44, p. 171.

this my graunt endure as long as there remaineth in England, either love or dread of Christian name."²⁸

So essential was it then regarded to maintain, at all hazards, the *pax ecclesiae*, that the red handed murderer, even, when he once reached the sacred precincts of the church's domain, was to be protected from the mere temporal powers of the earth, because he thus placed his faith in a higher law and the mundane officers of the law, for attempting to preserve the peace of the realm, if they transgressed upon the sacred soil consecrated to the Lord and used also for the protection of criminals, were classed along with traitors to the Lord and a dire curse proclaimed against them. It is well for the race that such delusions have passed away, along with the delusions of witchcraft and other fanaticisms of that age.

The Whitefriars, or Alsatia, an establishment of the Carmelites, was founded by Sir Patrick Grey, in the year 1241, upon a plot of ground, granted by Edward I, on Fleet street, located between what is now Salisbury street and the Temple, and Fleet street and the river Thames.²⁹

According to the law, as it finally developed, if a man fled to any one of the many sanctuaries, *chartered by the Crown*, and claimed protection from the civil authorities for a crime he had committed, regardless of the enormity of his crime, he could remain there undisturbed, for life and was not obliged to make his *abjuration of the realm*, as he was required to do in case the asylum was not such a chartered institution. Many

²⁸ *Ante idem.*

²⁹ Chamber's Journal, Vol. 44, p. 171.

of these chartered asylums were established, and aside from those mentioned, there were sanctuaries so chartered at Wells, Norwich, York, Manchester, Derby, Lancaster and Northampton.³⁰

In the absence of a special charter, however, the crime of treason was not a sanctuary crime and traitors were not protected, even though they sought the portals of such consecrated places.³¹

During the reign of Edward I, about the year 1262, the Abbot of Westminster attempted to extend the privilege of sanctuary, to those guilty of treason, to debtors and other classes of criminals than those who had formerly enjoyed the right and he also contended that the civil officers were not allowed, under the conditions of the charter of that institution, to enter upon any places, however remote, that belonged to the abbey. A law suit resulted and notwithstanding the broad terms of the charter above quoted, it was decided by all the justices that sanctuary was confined to felons alone and that the sheriffs of London had a right to enter the town of Westminster and to proceed to the very gates of the abbey and to enter the houses of the abbey elsewhere in the county, to arrest felons.³²

³⁰ *Ante idem.*

³¹ III. Reeve's History English Law, p. 331.

³² 29 Ass. 34; II. Reeve's History English Law, p. 81; Chamber's Journal, Vol. 44, p. 171.

Reeve says, speaking of the sanctuary at Westminster: "The resort of felons to this place, being in the metropolis of the kingdom, must have been very great and productive of great disorders." *ante idem.*

The sanctuaries to which special charters had been granted, were known during the period of Henry VII, as private sanctuaries, while those that had not received special charters were called

The class of criminals who sought protection under the right of sanctuary, included the whole gamut of crimes known to English law, murder or homicide, debt, horse and cattle stealing, housebreaking, or burglary, escaping from prison, rape, harbouring a thief, treason, receiving stolen goods, counterfeiting, larceny and the other crimes common in the realm and made so by statute, or existing at common law.

During the reign of Henry VII, it was decreed that when an offender fled to sanctuary, it was not enough for him to declare that he came there to save his life, but he must add that he had committed a felony; though he need not specify the felony, before the coroner came.³³ But if he failed to make such a general declaration, he could be dragged from the sanctuary and was not exempt from civil process.³⁴

general sanctuaries and in distinguishing the two; a historian of that period has said:

"If a man fled to such a sanctuary as Westminster Knoll, he might remain undisturbed for life; but if he chose to abjure within the forty days, the coroner was to appoint him a day to do it. The law of sanctuary is laid down in a reading of this period in the following manner: None shall take sanctuary but *in periculo vite*, as for treason, felony, or the like and not for debt; for a grant or prescription to have sanctuary for debt was against law and void. But the reading lays down a strange quibble to evade this; for it admits, that if a man's body was in execution, and he escaped, and came to a sanctuary, ordained as a refuge, and safeguard for a man's life, he should have benefit thereof, *because by long imprisonment his life might be in jeopardy*. If a church was suspended for bloodshed, he who took it for sanctuary should still enjoy it for forty days and abjuration for felony, discharged all felonies done before the abjuration. A man could not abjure for petit larceny, however, but only for such felonies as induced the pain of death." IV. Reeve's History English Law, p. 255.

³³ 3 Henry VII., 12; IV. Reeve's History English Law, 253.

³⁴ *Ante idem*.

The system whereby the felon fled to sanctuary and was accorded the privilege is described in the literature of the period descriptive of the manner of enjoying this right.

A knocker was usually provided at the outer door of the abbey and one or two janitors roomed above the door, to admit such nocturnal visitors as called at different hours to claim their sanctuary. After the refugee was admitted to the sanctuary, the Galilee Bell was tolled, to announce to the outer world that another sanctuary criminal had been admitted. A gown of black cloth, with a yellow cross, was given to the culprit to wear and he was disarmed and assigned to his quarters.³⁵

The oath administered to the refugee has been preserved by the Harleian Manuscripts³⁶ and a form of

³⁵ Preface of Rev. James Raine's to the Fifth Volume of the Surtees Society, gives the following description of the manner of claiming sanctuary at Beverley and Durham:

"Persons who took refuge fled to the north door and knocked for admission. * * * As soon as anyone was so admitted the galilee bell was immediately tolled, to give notice that some one had taken sanctuary. The offender was required, before the shrine of the patron saint, and certain credible witnesses, to tell the nature of his offense, and to toll a bell, in token of his demanding the privilege of sanctuary. * * * Everyone who had the privilege of sanctuary was provided with a black gown and a yellow cross, called St. Cuthbert's Cross, upon the left shoulder. * * * If one's life was saved the third time, by the privilege of sanctuary, he became permanently a servant of the church." Chamber's Journal, Vol. 64, p. 514.

³⁶ This is the oath administered by the Archbishop of York, at Beverley, as same is preserved in the register, according to the Harleian Manuscript "Ye shal be trew and feythful to my Lord Archbishop of York, lord of this towne; to the Provost of the same; to the Chanons of this chirch, and all other ministers thereof. Also, ye shal bere gude hert to the Baillie and Governors of this

confession and abjuration, administered by Sir William Rastall, Chief Justice of the Court of Common Pleas during the reign of Queen Mary, has been handed down to us.³⁷

While the right was held not to extend to cases of treason, generally, in different reigns, we find that it was extended to include treason, as well as the lesser felonies.

Henry IV wrote a letter to Cardinal Langley, which is preserved in the Treasury,³⁸ wherein that monarch respected the privilege of sanctuary, even in a case of treason, and asked the protection of St. Cuthbert for the person of Robert Marshall, "late comitted to prison for treason, now escaped and broken into the same into

towne, to al. burges and comyners of the same. Also, ye shal bere no poynted wapen, dagger, knyfe, nor no other wapen agenst the kyng's pece. And ye shal be redy at all your power if there be any debate or stryf, or oder sotham case of fyre within the towne, to help to surcess it. * * * So help you God, and this holy Evangelistes." Chamber's Journal, Vol. 64, p. 514.

³⁷ As reproduced, in Chamber's Journal (Vol. 64, p. 514), this oath is as follows: "This hear thou, Sir Coroner, that I M of H. am a robber of sheep or of any other beast, or a murderer of one or mo, and a felon of our lord, the king of England; and because I have done many such evils or robberies, in his land, I abjure the land of our lord the king of England and I shall haste me toward the port of such a place which thou hast given me; and that I shall not go out of the highway; and if I do, I will that I be taken as a robber and a felon, of our lord the king; and that at such a place I will diligently seek for passage and that I will not tarry there but one flood and ebb, if I can have passage; and unless I can have it at such a place, I will go every day into the sea up to my knees, assaying to pass over; and unless I can do this within forty days, I will put myself again into the church as a robber and a felon of our lord the king; so God help me and his holy judgment."

³⁸ Chamber's Journal, Vol. 64, p. 515.

youre church of Duresme; we having tender zele and devocion to the honour of God and St. Cuthbert, * *
 * wol that for that occasion nothyng be attempted that shal be contrarie to the liberties and immunitie of our church. We therefor wol and charge you that he be surely kept there, as ye wol answere unto us for him.—Yeven under our signet at our towne of Stanford, the xxvii day of July.”

There was flagrant breach of the ancient privilege of sanctuary, in England, in 1378, in the case of Sir Robert Haule and Sir John Shackle. Having escaped from the Tower, these gentlemen took refuge in Westminster. Boxhall, the constable of the Tower, with fifty armed men pursued them and although the celebration of mass was in progress, when they entered the abbey, they pursued the prisoners and although Sir John Shackle escaped, they killed Sir Robert Haule, by hacking him, with their swords, while he ran around the choir, until he fell dead, with twelve serious wounds, near the prior's cell.³⁹

Owen Tudor, the father of Henry VII took refuge at Westminster and Queen Elizabeth, the widow of Edward IV, with her son, also took sanctuary there to escape the ferocity of her inhuman brother-in-law, Richard III.

Sir Thomas More gives a graphic account of the sanctuary of Elizabeth:

“Therefore now she (Queen Elizabeth Woodville) toke her younger sonne the Duke of Yorke and her daughters, and went out of the Palays of Westminster,

³⁹ The Green Bag, Vol. 8, p. 425. He was buried as a martyr, in the south transept of this abbey and was followed by Chaucer, a few years later, who was buried at his feet. *ante idem*.

into the Sanctuary and there lodged in the Abbote's Hac and she and all her children and campaignie were registered for Sanctuary persons. Whereupon, the Bishop (Lord Chancellor Rotheram, Archbishop of Yorke) called up all his servants and took with him the great seal and came before day to the Queen, about whom he found much heavyness, rumble, haste, businesse, conveyhaunce, and carriage of her stuffe into Sanctuary. Every man was busy to carry, bear, convey, stuffe, chestes, and fardelles, no man was unoccupied, and some carried more than they were commanded to another place. The Queene sat belowe on the rushes, all desolate and dismayed."⁴⁰

A pathetic picture, of this poor widowed Queen, sitting all alone, amid the green rushes, a refugee from the ferocity of her wolfish brother-in-law. One devoid of chivalry and possessing only common human instincts of pity would have offered protection to a lady in such sad plight, but history does not record it of "Crookbacked Richard," for he determined early to prove a villain and, to clothe his naked villany "with old odd ends stol'n forth of holy writ"; he seemed a saint, when most he played the devil and was not only devoid of pity for others, but found, in himself, no pity for himself.⁴¹

An instance of the temporary violation of the royal charter privileges granted to St. Martin's le Grand, occurred in September, 1442, when an officer was conducting a prisoner from Newgate to Guildhall. When they reached Panyer Alley five of the prisoner's friends rushed out and rescued him from the officer and took him to St. Martin's claiming sanctuary. The sheriffs

⁴⁰ Littell's Living Age, Vol. 254, July-Sept., 1907, 701.

⁴¹ Richard III., Act. V., Scene, III.

of London went to the Church and not only took the prisoner, but all five of his friends, with chains round their necks to Newgate. The matter was brought before the King's Star Chamber, by the Dean and Chapter of St. Martin's le Grand and the claim advanced that the ancient charter privileges of the Church had been violated by the Sheriffs and the King ordered the men to be sent back to St. Martin's "there to abide freely, as in a place having franchises, whiles them liked."⁴²

During the reign of Henry VII, the interesting case of Humphrey Stafford, was decided, wherein the right of sanctuary, in treason, was expressly denied. Stafford had been attainted of treason and claimed sanctuary but was taken from the sanctuary and imprisoned in the Tower. When brought to the Bar of the King's Bench, he pleaded his right of sanctuary, but after solemn discussion and reflection, the judges gave a unanimous decision that treason was such an exalted crime against the prerogatives of the King, that it could not be included within the crimes for which sanctuary would be allowed, and they disregarded the

⁴² Chamber's Journal, Vol. 44, p. 171.

The debate at the Council Board, over the right to take refugees from the sanctuary, occasioned by Queen Elizabeth's refuge to Westminster, is not without interest, in showing the views then obtaining on this custom. It was contended that no right of sanctuary existed, since no crime had been committed, as the right was only extended to criminals, in fear of their lives; that the little son had no right to sanctuary at all and that it was a flagrant abuse of the privilege for the Queen to claim it. Those who advocated roughly taking them away, were overcome by the mild persuasion urged by the Archbishop of York, who counseled that the child be obtained without force, if possible. See, Chamber's Journal, Vol. 44, p. 171, Speed; Sir Thomas More.

ancient charters to the contrary and gave judgment that Stafford should be executed.⁴³

It was attempted to have this holding reviewed the year following the decision, when the Abbot of Abingdon appeared before the judges and produced his ancient charters, upon which he claimed his privileges were founded and the whole issue was gone into in exchequer chamber, before the judges. The Abbot claimed that the judges should confer with the prelates before pronouncing judgment, but one of the judges replied that:

“There can be no franchise without grant from the king. For the king can grant that any person who enters such a place, having committed treason, shall not be taken therefrom. And this shows that it can be done without the assent of Pope or Bishop, and that the Pope cannot do it within this realm. For to pardon or dispense with treason, pertains exclusively to the king. And a place of safety, is as a *privilege*, not as sanctuary. But when the Pope has consecrated the place, then it is sanctuary, not before. * * * But the principle of protection arises by our law, of which the cognizance belongs to us.”

And this view obtaining, the Abbot was denied his suit and it was finally held that no right of sanctuary existed in case of a charge of treason.⁴⁴

Illustrating the growing tendency to limit the privilege of sanctuary during the reign of Henry VII, another significant case, will not be studied in vain.

⁴³ Year Book, I. Henry VII., fol. 24; IV. Reeve's History English Law, p. 253.

⁴⁴ IV. Reeve's History English Law, p. 254, Finlason's note.

This is one of the many instances of the struggle going on for centuries between the civil authority, in its attempt to narrow the right of sanctuary and the church, to enlarge or preserve it.

Two felons were taken out of sanctuary, at Southwark and when arraigned for their crimes before Sir Thomas Frowike, Chief Justice, they pleaded their sanctuary and prayed to be restored. They were commanded to plead to the felonies with which they were charged, on the merits, but refused, claiming that as they were wrongfully taken out of sanctuary they were bound to plead to the indictment; the court, however, found that they had not been taken out of sanctuary and then, without arraigning them again, ordered that they be subjected to the terrible *peine forte et dure*, for standing mute and refusing to plead. So final judgment was entered, notwithstanding their right to sanctuary, that they be taken to the jail, from whence they came, and laid upon the bare ground, and that so much weight be laid upon them as they could suffer and more, and that they should have nothing to eat but bread and water; and that so they should be kept, continually, until they died.⁴⁵

As indicative of the cruelty and barbarism then obtaining, this judgment is an important index and that such a judgment should have been rendered against men claiming the privilege of sanctuary, was not only contrary to the law of *peine forte et dure*, which punishment was only assessed upon those standing mute and refusing to plead at all, and not to those claiming an exemption given them by such a well settled custom approved by the laws and decisions of the courts for many centuries, but it was certainly contrary to the spirit and intent of the law and condemns the judges

⁴⁵ 21 Henry VII., Keilway, 70; IV. Reeve's History English Law, Finlason's note, p. 254.

pronouncing such a harsh judgment, even unto this late day.

In Scotland, by the ancient canons of the Scottish Councils, much more sacredness was attached to the plea of sanctuary, than obtained during this period of English history. Excommunication was there incurred for the offense of taking criminals from sanctuaries and depriving them of the protection of the church. Scottish kings granted charters recognizing broader privileges in certain churches than in others, and many particular ecclesiastical asylums were established in Scotland, by special charters.

One of the most celebrated sanctuaries in Scotland was the church of Wedale, now called Stow, for in this church there was an image of the blessed Virgin, believed to have been brought by King Arthur, from Jerusalem. David I, of Scotland, granted the "king's peace," in addition to the church's protection, to those refugees taking sanctuary at the church of Lesmahagow, and it was, for centuries, one of the most prominent sanctuaries of Scotland.

One of the most remarkable features of the custom of sanctuary, obtaining in Scotland, was that of the *Clan Macduff*, alleged to have been granted by Malcolm Canmore, on recovering the throne of his ancestors. Any person related within the ninth degree to the Chief of the Clan Macduff, who committed manslaughter, was entitled, when he fled to Macduff's cross, in Fife, to have his punishment remitted to a fine, or at least to be repledged and exempted from trial in any other jurisdiction, by the Earl of Fife. History records that this privilege of sanctuary, saved the life of Hugh de

Arbuthnot and his accomplices, from trial for the murder of John de Melvil of Glenbervie, in the year 1421.

The Scotch law of sanctuary was more guarded than the English, in the middle ages, in affording too easy an immunity for crime, but in this country, there existed in most recent times, a sanctuary for debtors in the abbey and palace of Holyrood, with its precincts, including the hill of Arthur's Seat and the Queen's Park.⁴⁶

The privilege of sanctuary, while it obtained in England and Scotland gave rise to considerable legislation and litigation, to restrain the right within the proper limits and to interpret the laws governing the privilege as it had previously been enjoyed.

In 1378 it was ordained that debtors claiming sanctuary with the intent of defrauding their creditors should have their goods and lands levied upon to discharge their debts.⁴⁷

In 1487 Pope Innocent VIII authorized the arrest of persons who left the sanctuary, to commit murder, robbery or other felony, though they sought the sanctuary, the second time, for protection and he ordered at the same time that those inmates of sanctuaries who were guilty of treason should be prevented from leaving the realm.⁴⁸

⁴⁶ Chamber's Journal, Vol. 44, p. 170, 171; *idem*, Vol. 64, 515.

Imprisonment for debt was abolished in Scotland, in 1880, and while the privilege still exists in form, at the places noted, in fact it has ceased to be a necessary legal exemption, since the repeal of this law.

⁴⁷ Chamber's Journal, Vol. 64, p. 515.

⁴⁸ This bull was confirmed by Alexander VI, and Julius II, in 1493, and 1504. *ante idem*.

Statutes of the time of Henry VIII greatly curtailed the privilege of sanctuary. By act of Parliament, passed in the twenty-first year of his reign,⁴⁹ it was provided that the culprit:

“Immediately after his confession, and before his abjuration, was to be branded by the coroner with a hot iron upon the brawn of the thumb of the right hand, with the sign of the letter A, to the intent he might be the better known among the king’s subjects to have abjured.”

It was found that the citizenship of the realm was becoming weakened by sanctuary men *abjuring the realm*, so Henry VIII, by statute provided,⁵⁰ That

“every person abjuring was to repair to some sanctuary within the reign which himself should choose, and there remain during his natural life; and to be sworn before the coroner upon his abjuration so to do. But if he went out of that sanctuary, unless discharged by the king’s pardon, and committed murder or felony, he was liable to be brought to trial for that offense, and was excluded from the right of sanctuary.”

In the twenty-sixth year of the reign of this monarch, sanctuary was taken away where the crime was treason,⁵¹ and in the thirty-second year of his reign it was enacted that “all sanctuary persons were to wear a badge or cognisance to be assigned and appointed by the governour of every sanctuary, openly upon their outer garment, of the compass, in length and breadth of ten inches under the pain of forfeiting the privilege of sanctuary.” They were also prevented from carrying knives or swords or other weapons and were not to

⁴⁹ 21 Henry VIII., c. 8.

⁵⁰ 64 Chamber’s Journal, p. 515.

⁵¹ 26 Henry VIII.

leave their lodging except between sunrise and sunset, and the right of sanctuary was also confined, by Henry VIII, to parish churches, churchyards, cathedrals, hospitals and college churches and all dedicated chapels.

One of the first acts of James I, when he began to rule over England, was to further abridge the right of sanctuary and twenty years afterward in 1624, the same monarch finally abolished the right of sanctuary for all kinds of crime, in England.⁵²

Various precincts continued to afford shelter for criminals, in and about London, however, long after the enactment of this statute of James I, intended to finally abolish the practice and it was not until the later act of 1697 that the custom was finally abrogated for good, in England.⁵³

Both while the practice of sanctuary obtained and years after it passed away, however, the institution furnished a theme for popular authors to weave romances around and Shakespeare, Shadwell, Sir Walter Scott, and other writers, whose names commence with other letters of the alphabet, have found the ancient law of sanctuary, an attractive source of legal reference.

In describing the argument before the Council, as to the right of Queen Elizabeth, the widow of Edward IV and her son, to claim sanctuary, when they had committed no crimes and the son had done nothing to entitle him to sanctuary, Shakespeare makes Buckingham say, in Richard III:

⁵² 21 James I., c. 28.

⁵³ 8 & 9 William IV., c. 26.

"*Buck.* * * * You break not sanctuary in seizing him.
 The benefit thereof is always granted
 To those whose dealings have deserv'd the place,
 And those who have the wit to claim the place;
 This prince hath neither claimed it, nor deserv'd it;
 And therefore, in mine opinion, cannot have it;
 Then, taking him from thence, that is not there,
 You break no privilege nor charter there.
 Oft have I heard of sanctuary men;
 But sanctuary children, ne'er till now."⁵⁴

Cardinal Wolsey sought the benefit of sanctuary, after his disgrace, at the Abbey of Leicester, in King Henry VIII, in the following touching plea:⁵⁵

"O father Abbot, an old man, broken with the storms of State,
 Is come to lay his weary bones among ye; Give him a little earth,
 for charity."

The poor, desolate widow of Edward IV, after the death of her husband, whose plea of sanctuary we have already described, is thus made to reflect upon the protection in sanctuary, in 3' Henry VI:

"*Queen Elizab.* I'll hence, forthwith, unto the sanctuary,
 To save at least the heir of Edward's right.
 There shall I rest secure from force and fraud."⁵⁶

And in Coriolanus, as if realizing that sanctuary was an institution that had out lived its usefulness, Shakespeare thus refers to it as a "rotten privilege"; when Aufidius is made to say:

"*Auf.* * * * nor sleep nor sanctuary, being naked,
 sick; nor fane nor capital;
 The prayers of priests, nor times of sacrifice,
 Embarquements all of fury, shall lift up
 Their rotten privilege and custom 'gainst
 My hate to Marcius."⁵⁷

⁵⁴ Richard III., Act, III., Scene, I. For discussion of this and other references in Shakespeare, to the Law of Sanctuary, See White's "Law in Shakespeare," Sec. 324, p. 354.

⁵⁵ Act IV., Scene, I.

⁵⁶ 3' Henry VI., Act. IV., Scene, IV.

⁵⁷ Act I., Scene, X.

Already the trend of public thought was against the custom which afforded exemption to the criminal seeking refuge in the sacred places of the kingdom, and the ancient law of sanctuary, since the reign of Henry VII had been gradually amended and so many different limitations were imposed upon the ancient privilege during the reign of Henry VIII, that the public were about ready for the final repeal of the law, by King James, so the gifted Shakespeare, ever alive to the popular views of his audiences, in referring to sanctuary, in *Coriolanus*, speaks of it as a "rotten privilege" that could not stay the hatred of Aufidius for Marcius.

This old institution has passed away forever, in the ever flowing flood of time, carried away by the current of the centuries. The necessity for such a custom has long ceased to exist, but in the dim past, when the "avenger of blood" was abroad in the land and men, fed upon the delusions that were rampant, clamored, like wolves, for the life blood of the criminal, the old knockers on the sanctuary doors were most welcome sights to the fearful criminal, pursued by the howling mob. In our imagination we can see the cringing murderer, bent and fearful, as he hurries through the black browed night, followed by his blood-thirsty pursuers, like a hunted stag, fleeing for the blessed portals of the sacred places. What a sigh of relief he must have felt, when he reached the ancient altar of some of the old sanctuaries of the middle ages and with what exultation his heart must have throbbed, as he clung to the ancient "frith-stool" that for untold centuries had afforded protection to criminals from the vengeance of the pursuer.

This obsolete custom of the inhabitants of the lost world of the past had for its recommendation the charitable and philanthropic object of saving men from the many "crimes against criminals," then obtaining. Many instances, no doubt, existed, where the practice was used to prevent the civil authorities from enforcing the law and it was used as an instrument whereby "crimes went unwhipt by justice." But in the harsh days when the extremes, in that regard, prevailed, it is as well that Mercy was thus used to temper Justice, and, upon the beneficent theory that "it is better for a thousand guilty men to go free than for one innocent man to suffer," it was an institution accompanied with most benevolent results.

The hands of the officers of the law were held up when they came to the charmed portals of the sacred sanctuary. The old Mosaic law and the time honored charters of the Crown decreed it. And while the officer was thus thwarted and Justice cheated, the "boys of Westminster Knoll"; "the birds of St. Martin's"; the "Bravoos of Alsatia" and "Freemen of the Borough," flourished and lived. Many of them, perhaps, belonged to the large class of the "predestined lost" and if their inner lives had been scanned, there were no doubt mitigating circumstances why they happened to be as they were. It may have been decreed, from the beginning that they should be criminals, instead of honest men. However this may be, they contributed to the quota of the crime of the world and with the right and wrong then obtaining, have past away forever. Let us be thankful that as many of them as did successfully embrace the privileges of sanctuary were spared through

this merciful custom, for, in the end, it will make no difference whether this or that criminal suffered death just at this or that particular time, or a little later. He paid the penalty of the flesh certainly, without much delay and that he was allowed to consort with holy men, free from the war of the outside world, and feel the influence of their altruism for a time, and listen to the service of the sacred altar, with its superstitious chant, could but have had a softening and leavening influence upon his life.

So while inconsistent with a proper administration of justice, which contemplates the visitation of equal punishment upon all alike, under similiar conditions, for the same crimes, amid the rapine and murder of the middle ages it was often a shield for innocence, as well as a protection for crime and we can hardly regret that there was such an oasis in the desert, where the persecuted could find rest from the wild beasts of the desert domains—"wilder than wildest wolf or bear." They all have gone, who suffered then—gone, "with the snows of yesterday"—the way the Mammoth went his way. So whether it was good or ill, since sanctuary gave to those who lived and suffered here below, "one little glimpse of Paradise, to ope the eyes and ears of men," we would not have it otherwise.

CHAPTER X.

ANCIENT PUNISHMENTS.

In the broader sense, punishment includes any pain or detriment suffered in consequence of wrong-doing, but as treated of in this chapter, it means the pain or other penalty imposed by an authority to which the offender is subject, for a crime or offense committed.

The term punishment is properly restricted to the penalties imposed by competent authority, for violations of law; but as the subject of the following pages will bear evidence, it has been frequently imposed upon the weak and the innocent, as well as upon the guilty, and instead of being always confined to the authority acting only in pursuance of the fixed rules of law, it has too often resulted from the arbitrary will of someone in superior authority.

“Man’s inhumanity to man” seems ever to have been a peculiar trait of the species and human cruelty exceeds that of all other animals, in the same proportion that man excels the lower species. In following the bent of his cruel impulses, man has never rect’ with good or ill, but like a ravenous beast of prey, far fiercer “than the wolf or bear, he slays his kind in cruel glee and sorrows he can slay no more.”

When we read the history of the punishments of antiquity, we can but wonder that the people suffered so long and so continuously as a result of laws which had for their foundation the passions or wickedness of only a small per cent of the people, instead of the beneficent

rules of conduct formulated by the "cool examiner of human nature," familiar with the actions of the multitude and prompted by altruistic motives, to legislate for the greatest happiness of the greater number.

Every just punishment should be limited to the necessity of defending and preserving the liberty of the masses of society from the usurpations and wrongs of individuals, hence, every punishment which does not arise from such necessity is tyranny.¹

Since the time of Beccaria men have realized that the groans of a tortured wretch cannot recall the time past, or reverse the crime once committed,² so punishments are now provided for, not to torment a sensible being, nor to attempt to undo the crime committed, but to prevent the criminal from doing further injury to society

¹ Justice is the bond which keeps the interest of individuals united and without this virtue men would return to their original state of barbarity. Marquis Beccaria, on "Crimes and Punishments," 9.

Carlyle has well said: "Cruel is the panther of the woods, the she-bear, bereaved of her whelps; but there is in man a hatred crueler than that."

² Baccaria's "Crimes and Punishments," p. 41.

The three theories regarding lawful punishment, are, retribution, prevention and reformation. According to the first of these theories, the object of punishment is the vindication of the law upon the offender, by the infliction of such pain or penalty as his crime deserves, hence, the motto for this theory, might be properly said to be Justice. The second idea, makes prevention of further crime, the sole object, the criminal being placed where he can do no further wrong to society, and the motto of this school of legal philosophers, can therefore properly be said to be protection. The third and by far the most philanthropic doctrine of punishment regards the object of correction as the primary one to be attained and that all punishment should cease when the criminal has been reformed. The motto for the last school of philosophy, might properly be said to be Brotherly Love.

and to deter others from committing similar offenses. But it was not always thus. Torture, of the worst kind, in the handling of criminals, has been consecrated as a time honored custom by most of the older nations of the world. Mankind, for centuries, seemed to forget that all men were brothers; that a man, after he is dead is good for nothing and since punishments were invented for the good of society, that they ought to be useful and not destructive, still they universally persecuted each other, even to the death.

All mankind have ever detested the violence of which they may themselves possibly be the victim, but the criminal is so far regarded as an enemy to society, that they universally desire the punishment inflicted upon another which they would never want inflicted upon themselves. Viewing all other men as inconsequential in the sum total of the universe, but each individual believing himself the center of the social unit, men have been ever ready to play the tiger and make the alleged criminal the lamb, because it was the other individual whose life was sacrificed.

Viewing the whole plan of society by the standards of the past, in the punishment of criminals, it is difficulty to determine whether the crimes against society or those of society against the alleged criminal, have been the greater. But with the idea of reforming the criminal, the barbarous tortures of the past have been eliminated and the trend of modern criminologists is to further limit all punishments, not in themselves wholly reformatory in their nature.

Excessive punishments have always increased, rather than diminished crime, yet authority to inflict punish-

ment has never been much concerned about the welfare of the race or of society, as a whole, and the humane law of the philosophers has been disregarded far too long to curb the ingenious cruelty that has inflicted penalties and pains upon alleged criminals, frequently wholly innocent of any crime.

The object of this chapter, however, is not to moralize about crimes and punishments, but to contribute something to the vast fund of historical information upon the subject of ancient punishments, with a few illustrations of the pains and penalties inflicted during the past ages, in the name of law, upon the unfortunate victims falling into the vortex of the current of a past civilization and hopelessly borne on to their destruction.

Capital punishment, by beheading was not practiced by the ancient Israelites, but was a custom of the Egyptians, Assyrians, Persians, Greeks and Romans,³ and the French. We find that the "chief baker," who incurred Pharaoh's ill-will, was accordingly decapitated;⁴ John the Baptist lost his head on the order of Herod;⁵ James the Apostle suffered a similar fate,⁶ and many other of the early martyrs were beheaded.⁷

Burning to death was of pre-Mosaic authority, for we find that when it was reported to Judah that his daughter-in-law Tamar, was with child and had played the harlot, Judah said, "Bring her forth and let her be

³ Rawlinson's "Ancient Monarchies."

⁴ Genesis, XL., 19, 22.

⁵ Matthew, XIV., 8, 10.

⁶ Acts, XII., 2.

⁷ Revelation, XX., 4. A common punishment during the French Revolution.

burnt.’’⁸ This was the punishment inflicted upon a priest’s daughter, under the Sinaitic law, for fornication,⁹ and was also the form of punishment for incest with a wife’s mother.¹⁰

Drowning was a form of capital punishment in vogue among the ancient Babylonians, the Jews and the Romans and more recently among the French, English and Americans, during the witch craze in the seventeenth century.¹¹

Even before the witch craze, in England, in which death by burning and drowning was the usual mode of ending the lives of the poor unfortunates, accused of this hated and unprovable crime, there were precedents for the use of drowning, as a punishment, in that country.

⁸ Genesis, XXXVIII., 24.

⁹ Leviticus, XXI., 9.

¹⁰ Leviticus, XX., 14.

¹¹ John’s “Babylonian Laws,” etc., Josephus; Matthew, XVIII., 6.

The Emperor Tiberius, after torturing the victims of his wrath, cast them into the sea, where they were drowned. Sueton. Tiberii, lxii; Lea, “Superstition and Force,” (3 ed.) p. 377.

In France, death by drowning was inflicted upon the incontinent, as late as the sixteenth century and it was revived again during the revolution by the infamous Carrier, at Nantes, in the eighteenth century.

Ninety priests were loaded into the *gabare* and sunk in the river Seine. Then a hundred and thirty-eight persons were similarly drowned, but the *gabare* was soon done away with and men, women and children were stripped naked and thrown into the river, in broad daylight and not even under the cover of darkness. They were tied together, feet and feet and hands and hands, and in their hideous death struggles they churned the water, for the edification of the cruel crowd, until the last poor struggler had sunk to his final rest. (See article by W. H. Davenport Adams, “Pains and Penalties,” in The Gentleman’s Magazine, Vol. 46, p. 362.)

During the reign of Edward II felons were put to death by drowning, for we find that in the sixth year of the reign of that monarch, the jury for the hundred of Cornylo, in Kent, exhibited a presentment to Hervi de Stanton, and his associate justices itinerant, sitting at Canterbury, in the Octaves of St. John the Baptist, importing, that the Prior of the Christ-church in Canterbury, did, about eleven years then past, divert the course of a certain stream, called Cestling, in which such felons as were condemned, to death, within the before-mentioned hundred, ought to suffer judgment by drowning.¹²

Drowning was regarded as an especially appropriate punishment for women in Scotland, at an early day and according to Dr. Hill Burton, in 1624, eleven gipsy women were sentenced to be drowned in the North Loch, of Edinburgh, in the hollow where the Princess street Garden is now located.¹³

In 1685 two women, Margaret M'Lauchlan, a widow, and Margaret Wilson, a young girl, of eighteen, were drowned at Wigtownshire, for their religious belief. They were bound to stakes where the swift tide of the Solway overflows twice a day. After a partial unconsciousness, the young girl was revived and was urged by her friends to say "God save the King." She refused and as the waters closed over her for the last time, she gasped: "I am Christ's." And thus she gained a place in history, as a martyr to her belief, and her young life was forfeited as a penalty for hav-

¹² Herbert's *Antiquities* (1804), 154; Ex. vet. cod. M. S. pene's Rog. Twysden bar. p. 108.

¹³ Gentleman's Magazine, Vol. 46, p. 501.

ing incurred the religious and political bigotry of a despotic monarch.¹⁴

Exposure to wild beasts, was a common punishment of the Israelites, and Romans, for wickedness or unfaithfulness. Darius caused Daniel to be brought and cast into the den of lions,¹⁵ for this was the law of the Persians, and the King had entered a decree that it should be so, and another ancient authority,¹⁶ advises us that a disobedient prophet, named Jadon, met death from God, by being cast before the lions.

Hanging is one of the forms of capital punishment that has survived for thousands of years, for we find that it was in general use among the ancient patriarchs,¹⁷ the Persians¹⁸ and the Greeks¹⁹ and has continued as a mode of capital punishment ever since, in other civilized, or rated civilized, countries.²⁰

Precipitation, sawing asunder, slaying by spear or sword, stoning to death, strangling and suffocation, were all different modes of inflicting the death penalty, practiced among the ancient Israelites and other ancient peoples, from the earliest time.

The children of Judah cast 10,000 Edomites from a rock to their death, according to the second book of Chronicles;²¹ even the valiant David, painful to relate, when he took the cities of the children of Ammon,

¹⁴ Archibald's Stewart's "Wigtoun Martyrs."

¹⁵ Daniel, VI., 16.

¹⁶ Josephus, Ant. VIII., IX., 1.

¹⁷ 2 Samuel, IV., 12.

¹⁸ Rawlinson's Anc. Mon. i, 477; Layard's Ninevah and Babylon, 295 note.

¹⁹ Herodotus, iii, 159; Josephus, Ant. VI., XIV., 8.

²⁰ Baccaria's "Crimes and Punishments."

²¹ 2 Chronicles, XXV., 12.

brought forth all the people and “cut them with saws, and with harrows of iron, and with axes”;²² the spear, javelin or dart, was to be used on trespassers, at the foot of Sinai;²³ the sword was taken by the Levites against the worshipers of the golden-calf;²⁴ Samuel hewed Agag to pieces with the sword;²⁵ stoning to death was the penalty for adultery, blasphemy, idolatry, for false prophesy and Sabbath breaking;²⁶ strangling was the proposed punishment for the Syrians, before Israel²⁷ and suffocation was used both by the ancient Jews and the Macedonians.²⁸

Crucifixion, was a refined mode of punishment used by the Jews and Romans, in the time of the Saviour. It was borrowed by the Romans and Grecians from the Phoenicians, Persians, Egyptians and Numidians, among whom it was in general vogue. Alexander is reported to have crucified two thousand Tyrians at one time, and the same number of rioters were crucified by Varos at one time, after the death of Herod.²⁹

Under Claudius and Nero, various Roman governors crucified large numbers of robbers, thieves, and political and religious criminals.³⁰

²² 1 Chronicles, XX., 3.

²³ Exodus, XIX., 13.

²⁴ Exodus, XXXII., 27.

²⁵ 1 Samuel, XV., 33.

²⁶ Hasting's Dict. Bible, vol. I., p. 527.

²⁷ 1 Kings, XX., 31.

²⁸ Rawlinson's Ancient Monarchies, iii, 246.

Hanging was ordained by the Laws of Ina, in England, twelve hundred years ago. (Herbert's Antiquities, p. 153.) Until 1783 Tyburn Tree, at the west end of Oxford Road (now street), was the usual place for execution of felons by hanging, in England.

²⁹ Josephus, Ant. XVII., X., 9.

³⁰ *Idem.* XX., V., 2.

The method of crucifixion is accurately described in the New Testament.³¹

After conviction, the victim was scourged with the *flagellum*, which was such a severe punishment that the afflicted one frequently died before the crucifixion occurred. In Jesus' case, the scourging seems to have taken place before the crucifixion, as was the custom.

The cross-bar was bound upon the back of the victim, or his head was placed in the *patibulum*, and he was then led through the city, accompanied by the centurions and soldiers having his execution in hand, amid the gibes and insults of the cruel crowd. The title, a piece of wood, covered with white gipsum, labeled with the crime for which he was to suffer, in letters of black, was usually carried before the condemned person, so that the curious might be advised of the cause of his death.

At the place of crucifixion, the prisoner was stripped and his clothes given to the soldiers; he was then bound to the *patibulum* and thus raised on ladders, until the notch was reached in the upright piece, to receive it, or the cross-piece was fastened to the upright post upon the ground and then raised into an upright position, with the afflicted one bound to the cross, with his hands nailed to the ends, there to suffer the slow agonies of a lingering death, which might last for hours or perhaps for days.

The shame of this torture to which the Saviour was subjected has become not only the symbol of salvation, but the true type of that absolute renunciation of the world which characterizes the true Christian, for did

³¹ John, XIX.

not Christ Himself say: "If any man would come after me, let him deny himself, and take up his cross and follow me"?³²

Burying alive, was a form of capital punishment applied in Rome as a punishment to the vestal virgins, violating their oaths of chastity and it was also in vogue in France during the middle ages.

According to the law of Numa, the unchaste Vestal was simply stoned to death,³³ but the cruel torture of burying her alive was devised by Tarquinius Priscus and inflicted from his time forward.³⁴

On her conviction, the poor creature was stripped of her *vittae* and other indicia of office and after being scourged, was attired like a corpse and placed in a closed litter, and then borne through the Forum, attended by her weeping relatives and friends, with all the ceremonies of a real funeral, to the *Campus Scele-ratus*, within the walls of the city, near the Colline gate. The vault, underground, was furnished with a couch, a lamp, and a table, with a little food. The pontifex maximus offered up a prayer to Heaven for the culprit and having thus performed his sacred office, delivered her to the executioner, who led her down into the subterranean cell and drew up the ladder and filled the pit

³² Matthew, XVI., 24; Mark, VIII., 14; Luke, IX., 23.

All authorities agree that of all deaths crucifixion was the most abhorrent, not only because of the pain resulting, but also because of the shame of such a death. Cicero, in his Oration against Varres, declared that it was impossible to find a fit word to describe such an outrage as the crucifixion of a Roman citizen, yet the gentle Galilean suffered this horrible death, with perfect resignation.

³³ Cedrenus, Hist. Comp. p. 148, 259.

³⁴ Dions. iii. 67; Zonaras, vii, 8.

with earth even with the ground,³⁵ thus forever consigning to mother earth the body of her wayward daughter, who, in pursuance of her God-given instincts, had violated the unnatural law of the barbarous pagan days of ancient Rome.

The gallant French gentlemen also reserved this horrible punishment for women and we read that during the year 1302 by order of the Bailli of Sainte-Genevieve, a woman was buried alive for some petty thefts which she had committed.³⁶ Philip Augustus is said to have put a French provost to death in this cruel fashion, because of the crime of perjury, regarding a transaction in connection with a vineyard³⁷ and in the thirteenth century in Bigorre, this punishment was inflicted for murder, the murdered and his murderer being interred in the same grave.³⁸ One performing the unnatural crime was also buried alive, in England, at an early day, according to Fleta.³⁹

Drawing and quartering, is of Egyptian and Roman origin, for we find that it existed at Rome five hundred years before Christ and is mentioned in the Twelve Tables.⁴⁰

Hanging, drawing and quartering is said to have been first introduced in England in the case of William

³⁵ Dions, ix, 40; Smith's Dict. Gr. & Rom. Ant. By a beneficent law, the poor lady's paramour was simply scourged to death, for his complicity in her awful crime.

³⁶ Gentleman's Magazine, Vol. 46, p. 366.

³⁷ *Ante idem*.

³⁸ *Idem*. p. 367.

³⁹ Fleta, p. 54; II. Pollock and Maitland's History English Law, p. 556.

⁴⁰ Rawlinson's *Anc. Mon.*; Niebuhr, ii, 313.

Maurice, a pirate, in 1241,⁴¹ although it afterwards became quite common, as a punishment for treason.

According to the terms of a sentence imposed by Lord Ellenborough, the criminal convicted of treason to be thus punished was addressed as follows: "You are to be drawn on hurdles to the place of execution, where you are to be hanged, but not until you are dead; for, while still living, your body is to be taken down, your bowels torn out and burnt before your face; your head is then to be cut off and your body divided into four quarters."⁴²

Hugh Spenser, the favorite of King Edward II, was put to death at Bristol, in 1326, and his body was quartered, as was the custom of the period, in similar cases, and his head was sent to London, while each quarter of his body was sent to each of the four principal towns of the kingdom.⁴³

On the execution of the Jesuit, Garnet, in England, in 1606, James I, who was more compassionate in this case than he was in the cases of witchcraft, where no punishment could be found too severe, gave orders that he should not be cut down until he was dead, so that he might be spared the tortures of drawing and quartering.⁴⁴ But no such mercy was shown to Guy Fawkes, who was tortured and drawn and quartered, the same year, after he was taken with the burning match in his hand, in his attempt to blow up the king and his parliament, in what was known as the gun-powder plot.⁴⁵

⁴¹ Gentleman's Magazine, Vol. 46, p. 368.

⁴² *Ante idem.*

⁴³ Gentleman's Magazine, Vol. 46, p. 496.

⁴⁴ *Ante idem.* p. 368.

⁴⁵ Green's History of England.

During the thirteenth century, in England, the usual punishment for petty treason was hanging and drawing for a man and burning for a woman.⁴⁶

Boiling in oil during the reign of Henry VIII,⁴⁷ was a punishment provided for poisoners.

Under the reign of this monarch, the power of the Crown was extended to cover powers not before recognized and while it is difficult to concede how citizens reared under the broad influence of the common law, could be brought to consent to such unusual and cruel punishment for any crime, the inhuman crime which brought about this harsh statute was such as to call for unusual handling, if not for such barbarous punishment as this act provided.

One Richard Roose had placed poison in a vessel of yeast in the Bishop of Rochester's kitchen and as a result of eating bread in which this yeast was used, seventeen persons in the family of the Bishop and others of his friends were poisoned. The enormity of the crime caused wide-spread indignation and such crimes were made treason and the offender subject to attainder. Roose was ordered to be boiled to death and in order to deter others similarly situated from perpetrating such a cruel crime, it was also provided by the act that henceforth, every wilful murder by poisoning, should be high treason and that all such offenders should be boiled to death.⁴⁸

Shakespeare makes the indignant Paulina, refer to this statute, in her reproachful speech to the Lords,

⁴⁶ Select Pl. Cr. pl. 191; Munim. Gildh. i, 101; II. Pollock and Maitland's History English Law, p. 511.

⁴⁷ 22 Henry VIII. c. 9. This statute was passed in 1531.

⁴⁸ IV. Reeve's History English Law, p. 427.

after the good Hermione's incarceration, in Winter's Tale, when she asks:

"What studied torments, tyrant, hast for me?
What wheels? racks? fires? what flaying? boiling
In leads or oils? What old or new torture
Must I receive, whose every word deserves
To taste of thy most worst?"⁴⁹

Margaret Davy, a young woman, convicted of murder by poisoning was also boiled to death, as provided by this statute, in 1542,⁵⁰ but this was the last victim to suffer such inhuman punishment and the act was soon afterward repealed.

The misguided efforts of the Church of Rome to punish heresy by use of the *Inquisition*, brought about untold suffering and misery in the world.

The Inquisition, was a tribunal of the Roman Catholic Church, for the discovery, repression, and punishment of heresy, unbelief and other offenses against religion. The emperors, Theodosius and Justinian, appointed officials known as Inquisitors, to look out and punish such offenders. They proceeded however in the name of the Emperors, in the secular courts, and no regular tribunal for the handling of this kind of alleged criminals, existed until the year 1248, after the fourth Lateran Council, held in the reign of Innocent III, when Innocent IV, established a permanent court for the prosecution and punishment of this class of offenders.

⁴⁹ The Winter's Tale, Act III., Scene, II.; White's "Law in Shakespeare," p. 186, Sec. 146.

⁵⁰ Gentleman's Magazine, Vol. 46, p. 364.

As late as the sixteenth century, in England, counterfeiters were punished by being thrown into boiling water. Gentleman's Magazine, Vol. 46, p. 364.

The prosecutions under this constitution were purely in the ecclesiastical courts, and for the next century, in France, Italy, Spain and Germany, the Pope, by appeal, regulated the severity of the punishments inflicted by the local authorities and the punishments were not so severe as they afterwards became.

In Spain, during the reign of Ferdinand and Isabella, on account of an alleged plot to overthrow the monarchy, by the Jews and Heretics, in the year 1478, on application to Pope Sixtus IV, they were permitted to take over, as it were, the whole tribunal formerly handled as a Church affair, into the hands of the State, and with this new regime, the Spanish Inquisition had its origin.

Inquisitors were now appointed by the Crown, instead of the Church and under the career of Thomas de Torquemada, in 1483, the reign of terror commenced in Spain. Llorente, the historian of the Inquisition, places the number of persons burned to death, during Torquemada's tenure of office, in sixteen years, in Spain, at 9,000, and during the term of office of the second head of the Inquisition, Diego Deza, in eight years, 1,600 met a similar death, by fire, as this was the customary punishment inflicted upon this hated class of innocents who opposed the ruling powers in Church and State.⁵¹

The procedure of the Inquisition is not without interest. The person suspected of heresy or unbelief, was arrested and thrown into prison, to be brought to trial when it suited the pleasure of his judges. The proceedings of the trial when the unfortunate one was

⁵¹ Llorente, ii, 147, 237.

brought into court, were secret; he was not faced with his accusers, nor were their names disclosed. The evidence of a guilty accomplice, without corroboration, was received against the accused and the person undergoing trial was liable to be put to torture, in order to extort a confession from him. When convicted, the punishment was death by fire, or on the scaffold, imprisonment in the galleys for life, or for a term of years, with forfeiture of his property, and civil infamy, if the offense was deemed not of sufficient gravity to justify burning to death.⁵²

After confession, under torture, the prisoner was customarily remanded to prison and when brought before the judge, if he persisted in his profession, he was condemned. If the confession was withdrawn, he was tortured again and if he recanted a second time, he was tortured a third time, for while the theory was that he could not be convicted, unless he let his confession stand, he was tortured until he confessed and was not allowed to voluntarily retract it, oftentimes.⁵³

Three judges were necessary to approve the infliction of torture to extract evidence from a person accused, in the reign of Ferdinand and Isabella,⁵⁴ but this law was often violated and the strappado, the scourge, hanging the accused by the arms, while his back and legs were loaded with heavy weights, fire, applied to the soles of the feet and pouring water down the throat were a few of the many tortures applied⁵⁵ to extort confessions from the poor unfortunates who fell into

⁵² Lea's "History of the Inquisition."

⁵³ Lea's "Superstition and Force," (3 ed.) 404.

⁵⁴ Lea's "Superstition and Force," (3 ed.) p. 409.

⁵⁵ *Ante idem.* 407, 409.

the hands of these religious zealots, imbued with a superhuman inclination to torture their fellow-men.

Of course the subject of the Inquisition is too large a field to attempt to do more than refer to its influence upon secular law in these pages, for while it continued unabated for centuries in countries subject to the Church of Rome and was not abolished in Spain, until the reign of Joseph Bonaparte in 1808,⁵⁶ in inaugurating a system of punishment for extracting evidence from the accused, its influence was wide-spread in all other countries, where the same system of punishment was carried and with time the same vile procedure was used in most other countries of Europe, in one form or another,⁵⁷ and with its examples of torture, which were gradually adopted in other countries, the equally baleful influence of the secret procedure, which was exemplified in the Star Chamber in England and the *Chatelet* of Paris, with the accompanying inquisitorial process, followed in the wake of this hateful institution of the middle ages.⁵⁸

The Grand Chatelet of Paris, as the seat of the criminal tribunal of the realm, has a record second to no other criminal court of the same age for atrocious punishments inflicted upon the poor unfortunates who were brought before the court, seeking justice.⁵⁹

It was the custom to torture all malefactors, or alleged criminals, brought before the criminal division of the *Chatelet* of Paris, in the fourteenth century. The

⁵⁶ Llorente's *Istoria de la Inquisicion*; Lea's "History of the Inquisition."

⁵⁷ *Ante idem*.

⁵⁸ Lea's "Superstition and Force," (3 ed.) 451.

⁵⁹ Du Cange's *Questionarius*.

customary procedure was accordingly divided into two classes of cases, those known as *ordinaire* and those called *extraordinaire*. In the former class of cases inquests were held to determine the guilt of the accused and in the latter inquisition was had, in which torture was habitually employed to secure a conviction.⁶⁰

The procedure was left entirely to the discretion of the criminal judge and in a short time the judge rarely found a case for inquest, but all cases were treated as within the rule *proces extraordinaire* and a merry chronicle of crime against criminals was here inaugurated, for long and tedious years.⁶¹

The only redeeming feature of the procedure of this court, was the universality of its punishments, for noble blood was made to flow equally with the plebeian, and none were exempt from the torture, who were brought before this court. If the culprit denied the alleged crime, he was tortured at once, to secure a confession and if he confessed he was tortured for confessing. On the other hand, if he failed to confess,

⁶⁰ L. Tanon, *Registre Crimenel de la Justice de S. Martin-des-Champs*, Introd. p. 85.

⁶¹ *Ante idem*.

In applying the ordinary and extraordinary question, in France, by means of the *estrapado*, an iron key was placed between the palms of the accused's hands, and they were tied behind his back and, by means of a rope passed through a pulley, in the ceiling, he was raised twelve inches above the floor with a weight of one hundred and eighty pounds to his right foot. This was the "ordinary" question. In applying the "extraordinary" interrogation, the same process was used, but the accused was raised up to the ceiling, with a two hundred and fifty pound weight tied to his foot, in a running line, two or three times, with the result that he usually swooned before the ceiling was reached the last time. (*Gentleman's Magazine*, Vol. 46, p. 504.)

there was no limit to the torture inflicted to extract a confession from him, so frequently it happened that in the effort to find out if a crime were really committed the poor unfortunate was killed by the torture to which he was subjected.⁶²

In 1338 one Jehannin Maci, was arrested and brought before this cruel court for stealing a brass pot, found in his possession. After torture, he confessed the crime and was drawn on a hurdle and hanged.⁶³

Gervaise Caussois—peace to his ashes—was brought before this august tribunal for stealing some iron tools and to induce him to confess he was tortured and promptly confessed. Thinking he might be guilty of other offenses, he was tortured again and then under the strain of the pain he suffered, he confessed to other petty crimes, when he was again tortured by use of the *tresteau*, when he again confessed to another petty misdemeanor when the judges mercifully caused him to be hanged, without more ado, thus ending his misery.⁶⁴

In 1390 poor Fleurant de Saint-Leu, was arraigned before this heartless tribunal for the awful crime of stealing a silver buckle. He denied the crime and was twice tortured, with increasing severity, when he finally confessed, but protested that it was his first offense. The merciful judges, out of the goodness of their hearts, decided this offense, being the first, did not merit death, so on the same day he was tortured thrice, to ascertain if he was not guilty of some other

⁶² Lea's "Superstition and Force," (3 ed.) 441, 442.

⁶³ *Registrae Criminel de Chatelet de Paris*, 1, 36.

⁶⁴ *Ante idem*, p. 36.

offense for which he could be killed; this failing to bring the desired result, he was again twice tortured, when he admitted that three years before he had unwittingly married a prostitute, when he was afterwards hanged, as this was found to be a sufficient offense, together with the stealing of the buckle, to justify the death penalty.⁶⁵

Poor Marguerite de la Penele, accused of stealing a ring, was tortured until she confessed and as she could not satisfy the human hyenas who were trying her, for some money found upon her person, she was again severely tortured and although no further confession was extracted from her she was buried alive.⁶⁶

The question *ordinaire* and *extra-ordinaire*, as put to the wretches brought before this criminal court at Paris, was to be answered by the accused while fastened to the wall, on a trestle or sliding table, with his wrists fastened in two rings; his mouth was forced open with a horn and water was poured down his throat, until he answered the question whether or not he was guilty of the offense charged against him.⁶⁷

Another form of torture used in the *Chatelet* at Paris, was what was called the "boots," being solid boards, pierced with holes, encasing the legs, up to the knees. Ropes were inserted through the holes and drawn so tight, by means by pegs of wood, driven into the holes, as to almost break the bones and twist the flesh off the legs, if the accused persisted in refusing

⁶⁵ Register Criminal du Chatelet de Paris, 201, 209.

⁶⁶ *Idem*, p. 322.

⁶⁷ Lalanne, Recueil des anciennes Lois Francaisse, tome, xx, pp. 284, etc.

to confess the crime charged against him.⁶⁸ This horrible and barbarous practice was not completely abolished in France, until the year 1788, when the monarchy repealed the law authorizing such cruelty, for the alleged reason that under such stress of punishment men would confess to anything.⁶⁹

The Guillotine was not a French invention, as generally supposed, but was imported from Italy, where a similar instrument, known as the *Mannaya*, had been used for centuries before it was used either in France or England.⁷⁰ It had been used in England long before it was used in France and was known as the *Halifax Maiden*, because of the special charter, giving this town a right to use it for petty larceny of any article exceeding thirteen halfpenny.⁷¹ It was used in France in the sixteenth century and at Toulouse, in 1632, it was the engine which accomplished the execution of the Duc de Montmorency.⁷² Doctor Joseph Guillotin brought the same engine of death before the National Assembly, in December, 1789 and he is generally recognized as the inventor of this terrible machine, which was used to decapitate so many of the nobility during the terrible French Revolution,⁷³ but a similar instrument had executed thousands in Italy centuries before it was known or used in France.⁷⁴

The Massola was used in Italy, at an early date,

⁶⁸ *Ante idem.*

⁶⁹ Article by W. H. Davenport Adams, in *Gentleman's Magazine*, Vol. 46, p. 506, entitled "*Pains and Penalties.*"

⁷⁰ History of Jean D'Auton; Holinshed's History.

⁷¹ Holinshed; *Gentleman's Magazine*, Vol. 46, p. 371.

⁷² *Ante idem.*

⁷³ The *Gentleman's Magazine*, Vol. 46, p. 372.

⁷⁴ *Ante idem.*

along with the *Mannaya* or guillotine, as it was afterwards called, in France, and by use of the former machine, the criminal was stunned with a blow from a mace, much as the butcher slaughters the ox or hog by striking him on the head and then while stunned. his throat was pierced with a long knife and his chest was ripped open.⁷⁵

But let us turn from the contemplation of other instruments used to accomplish the death of the criminals of the middle ages, and examine some of the milder forms of punishments in vogue.

These were only some of the most prominent methods of inflicting capital punishment upon alleged criminals, among the old Israelites, Persians, Greeks and Romans, and other lesser punishments, such as mutilation consisting in blinding,⁷⁶ cutting off the hands or ears,⁷⁷ branding,⁷⁸ plucking off the hair,⁷⁹ flaying,⁸⁰ scourging with thorns,⁸¹ the stocks, stripes,⁸² the wheel, the rack, the comb with sharp teeth, the burning tile, the low vault in which the culprit was bent double, the heavy hog-skin whip, and the injection of vinegar into the nostrils, were a few of the lesser punishments inflicted by these and other peoples for many long and tortuous years, upon all classes of criminals and accused persons.⁸³

⁷⁵ The Gentleman's Magazine, Vol. 46, p. 370.

⁷⁶ Exodus, XXI., 24; 2 Kings, XXV., 7; Rawlinson's Anc. Mon.

⁷⁷ 2 Samuel, IV., 12; Rawlinson's Anc. Mon. iii, 7.

⁷⁸ Rawlinson's Anc. Mon. iii, 194.

⁷⁹ 2 Samuel, X, 4.

⁸⁰ Rawlinson's Anc. Mon. i, 478; iii, 246; Herodotus, IV., 64.

⁸¹ 2 Samuel, VIII., 2; XII., 31; Stanley's History Jew. Ch.

⁸² Leviticus, XIX., 20. 2 Corinthians, XI., 24; Josephus, Ant. IV., VIII., 21.

⁸³ Lea's "Superstition and Force," (3 ed.) 375.

Blinding, under the Mosaic dispensation, was claimed to have been authorized under the law of retaliation, "an eye for an eye,"⁸⁴ etc., but it was seldom used among the patriarchs in old Israel.

The Assyrians and Babylonians used this means of torturing the criminals convicted of rebellion or revolt, in order to prevent them from doing further harm and to furnish an example to others of the enormity of the punishment for such an offense against the government.⁸⁵ We read in the book of Esther that such criminals were not permitted to look upon the king,⁸⁶ and in Persia this method of punishment was inflicted for rascality, thieving and rebellion.⁸⁷

According to the Code of Hammurabi, adopted some 2,500 years before Christ's time, a surgeon of Babylon who performed an unsuccessful operation, lost the hand that operated upon the patient and for other offenses, mutilation and blindness was provided for by this ancient code of laws.⁸⁸

William the Conqueror prohibited his nobles from inflicting the death penalty upon criminals who formerly suffered death by hanging, but in lieu of this more humane punishment, he authorized that criminals convicted of certain felonies should be blinded, by having their eyes pulled out; they were subjected to castration and to mutilation, by having their *hands and feet cut off*, according to the greatness of the offense,

⁸⁴ Exodus, XXI., 24; Leviticus, XXIV. 20.

⁸⁵ John's "Babylonian Laws," etc.; Rawlinson's *Anc. Mon.*

⁸⁶ Esther, VII., 8.

⁸⁷ Rawlinson's *Anc. Mon.* Josephus, *Ant.*

⁸⁸ John's "Babylonian Laws," etc.

to the end that they might live and furnish a horrible example to others committing such crimes.⁸⁹

According to Wigorn, in his annals, certain Welchmen, convicted of treason, in the eleventh century, had all these several kinds of punishment inflicted upon them.⁹⁰

Fox, in his work on Martyrology, reports a miracle in the case of Elivard, of Weston Regis, in Bedfordshire, who, being convicted of stealing a pair of hedging gloves and a whetstone, in the reign of Henry II, lost his eyes and genitals, and through his devout prayers, at the shrine of St. Thomas of Canterbury, they were restored to him again.⁹¹

This punishment by blinding and mutilation continued but a short time, in England, however, for King Henry I, in the year 1108, in the ninth year of his reign repealed this law and provided hanging for felons convicted of theft or robbery,⁹² who had formerly been subject to the punishment of blinding or mutilation, by this harsh law of William the Conqueror.

In Switzerland, at an early day, blasphemers were subject to having their *lips and tongue cut off*⁹³ and under the custom of Avignon, in 1243, a perjurer was liable to punishment by having his lips and nose removed.⁹⁴

Cutting off the ears was a punishment inflicted upon religious and political criminals in England, as late as

⁸⁹ Herbert's Antiquities, p. 153; Michelet.

⁹⁰ Flor. Wigorn, Annals, Ann. 1098.

⁹¹ Fox's Martyrology, lib. IV., fol. 229.

⁹² Herbert's Antiquities (1804), p. 154.

⁹³ Gentleman's Magazine, Vol. 46, p. 495.

⁹⁴ *Ante idem.*

the seventeenth century and the notable case of Bastwick, Burton and Prynne, who had their ears removed all at one time, in the Palace Yard, in London, in the year 1637, illustrates the barbarous cruelty then obtaining as to this class of criminals.

The prisoners were all favorites with the crowd, who strewed flowers and nose-gays around them, at the place of execution. The sheriff commenced with Burton, who was an especial favorite with the by-standers and when he removed each ear the people wept and groaned and roared as if each one in the assembly had his own ears removed. Bastwick loaned his own knife to the officer and made use of his professional information to advise him just how to remove his ears, so as to injure him the least and asked him to lop them close, that it might not be necessary for him "to come there again." Prynne had had his ears roughly cropped off three years before and when the officer again attempted to remove what remained, it gave him great pain, but the stern old Puritan endured it without a groan, such was the religious zeal with which they were all three sustained in this act of martyrdom. After the fearful ordeal was completed they were all three returned by the officer to the prison,⁹⁵ and thus ended another fearful example of misguided authority and religious bigotry, in thus pillorying and torturing three patriotic citizens who violated no law and who had committed no other offense than to speak plainly and then dared to refuse to bow the knee to an authority they did not recognize.

Branding with a hot iron, was a punishment inflicted

⁹⁵ Gentleman's Magazine, Vol. 46, 373.

by the Persians, upon the class of criminals who were deported, in order that they could subsequently be identified and to furnish an example to others of the fact that they had paid the penalty of the law as a result of their misdeed.⁹⁶ In Biblical days, when burning was inflicted as a punishment for adultery or fornication, branding on the forehead was also used, as a mark of shame.⁹⁷ Slaves were sometimes branded on the hand, by the ancient Jews,⁹⁸ much as horses are branded by the owner, in the western country, to identify the animal, but this was not in accordance with the Mosaic law, for such disfigurement was forbidden by the code of the old Israelites.⁹⁹

Formerly, in England, branding was used in the case of all clergyable crimes, by burning in the hand, but this law was repealed in 1829. In the middle ages, in England, branding with a hot iron, was a mode of punishment used for various offenses. The iron used had the form which it was desired to leave on the culprit's skin. It has not been in use for years, except in desertions from the army or navy, and this form of branding is regulated by statute and of late years ink, or other material is used, instead of a hot iron. By the Mutiny Act, of 1858,¹⁰⁰ it was provided "On the

⁹⁶ Rawlinson's *Anc. Mon.* ii, 194.

⁹⁷ Hastings Dict. of Bible, i, p. 523.

⁹⁸ Isaiah, XLIV., 5.

⁹⁹ Leviticus, XIX., 28.

¹⁰⁰ 21 Victoria, c. 9, sec. 35.

Branding was used by the American Colonists and in New England was a common punishment for Quakers, who were branded with red hot iron, on the shoulder, with a letter "H" for Heretic. (Alice Morse Earle's "Curious Punishments of By-Gone Days," pp. 138, 148.)

first and on every subsequent conviction, for desertion, the court-martial, in addition to any other punishment, may order the offender to be marked, on the left side, two inches below the arm-pit, with the letted D, such letter not to be less than an inch long, and to be marked upon the skin with some ink or gun-powder, or other preparation, so as to be visible and conspicuous, and not liable to be obliterated." This, in old England, as late as the Victorian age, shows the early training of the English upon the custom of punishment by branding.

Plucking off the hair, or scalping, was not always confined to the American Indians, but according to the inspired word of the Jews, it was a form of punishment, in ancient Israel, inflicted upon Jews who had indulged in mixed marriages.¹⁰¹

According to the prophet, in Isaiah, scalping, as a judicial practice was common in his time, for he says: "I gave my back to the smiters and my cheeks to them that *plucked off the hair*: I hid not my face from shame and spitting."¹⁰²

And according to the Biblical account of this ancient and severe punishment, inflicted upon criminals in old Israel, they were not as compassionate as the American Indians, who first killed their man, then removed the scalp with a knife, but they tore off the hair in such a brutal and barbarous manner, as to remove the skin by main force, with the hair, without the use of a knife

¹⁰¹ "In those days, also saw I Jews, that had married wives, of Ashdol, of Ammon, and of Moah * * * And I contended with them, and cursed them, and smote certain of them, and *plucked off their hair*, and made them swear, by God, saying Ye shall not give your daughters unto their sons, nor take their daughters unto your sons, or for yourselves." Nehemiah, XIII., 23, 25.

¹⁰² Isaiah, L, 6.

or other instrument to augment or ameliorate the suffering of the criminal.¹⁰³

Flaying, was a punishment in vogue among the Persians and Assyrians, and according to Rawlinson, the Assyrians would flay the victim, even after life was extinct¹⁰⁴ and the Persians were accustomed to flay and then crucify the criminals and Herodotus states that they used the skins of human beings thus obtained.¹⁰⁵

Along with this atrocious punishment of flaying, the Persians also seem to have been addicted to the recall of judges,¹⁰⁶ for Herodotus tells how King Cambyses not only recalled an unpopular judge, known as Sisamnes but actually flayed him alive, and covered the judgment-seat with his skin, as a warning to the next judge to be more careful in his judgments and decrees.¹⁰⁷

Manes is said to have been flayed alive, by Behram, king of Persia, in the year 277 and his skin was afterwards stuffed with straw, much as modern taxidermists stuff the skins of wild animals, and in this shape it was posted at one of the gates of Djondischaour.¹⁰⁸

In the sixth century Chosroes punished Nacoragan, one of his generals by flaying him alive, on account of his cowardice and his skin, when torn backward off his body, from his head to his heels, retained the form of the limbs, from which it had been stripped, and in this

¹⁰³ 2 Mac. VII., 7.

¹⁰⁴ Ancient Monarchies, i, 478; Layard's Ninevah and Babylon.

¹⁰⁵ Rawlinson's Ancient Monarchies, iii, 246; Herodotus, iv, 64, v, 25.

¹⁰⁶ John's "Babylonian Laws," etc.

¹⁰⁷ Herodotus, *ante*.

¹⁰⁸ Gibbon's Rome.

manner, it was sown up and inflated and exposed on a high projection, as a terrible example to other soldiers, of the punishment they would be subjected to if also guilty of cowardice in the discharge of their duty as soldiers.¹⁰⁹

Flaying is of rare appearance in Europe, but one or two cases are recorded. Philip the Fair is said to have inflicted such punishment upon the lovers of his sister-in-law, in 1314, and Pope John XXII, after the conviction of Hugues Gerald, Bishop of Cahors, in 1317, for sorcery, handed him over to the Judge of Avignon, who caused him to be flayed alive and then torn asunder by four horses, after which his remains were burnt.¹¹⁰

The Wheel was used as a method of punishment in France and England and other countries, during the middle ages and down to a comparatively recent period. St. Catherine, of Alexandria is said to have been put to death on a wheel, with jagged edges or spikes, which tore and cut her tender limbs, after the fashion of a modern chaff-cutter. According to the report of her case, the wheel was shattered, during the torture, by Divine Grace, hence the embroidered tunic worn by the Knights of Mount Sinai, a religious order, instituted in her honour, in 1063, representing a broken wheel, with spikes.¹¹¹

Bouchard, who was implicated in the murder of Charles le Bon, Count of Flanders, in the twelfth century, was bound to a wheel suspended in mid-air, so that the vultures could pluck out his eyes and otherwise

¹⁰⁹ Agathiu's "Life of Justinian."

¹¹⁰ Bertrand's "Un Eveque Supplicie."

¹¹¹ Martin's "*Les Vies des Saints*."

torture him. After his eyes were torn from their sockets and his face slit and torn by the sharp beaks of the birds of prey, he was finally put out of his misery, by darts and javelins, shot into his quivering body, by the blood-thirsty mob below.¹¹²

Scourging with thorns, was another form of punishment inflicted upon the peoples of other tribes, by the good old Jewish patriarchs.

Gideon threatened that when the Lord of Israel should deliver Zebah and Zalmunna into his hands that he would tear their flesh with the thorns of the wilderness and with briars.¹¹³ And according to the Divine word, when the men of Succoth were delivered into his hand he took the elders of the city and with briars and thorns, he scourged them.¹¹⁴

Knotted sticks, or ropes, with thorns, or iron points were customarily used as instruments of chastisement by the Jews, when they were successful in subjugating another race of people¹¹⁵ and they did not hesitate to apply the scourge on all occasions, as they regarded this as a method of teaching foreign nations their strength and their power to punish, so that it would be advertised abroad and cause other timorous nations to voluntarily submit to their authority.

David smote the Moabites with a line and cast them down to the ground and he scourged them and they became his servants and brought him gifts, to avoid being further scourged in this manner.¹¹⁶ And he

¹¹² Segur's Memoirs and Anecdotes.

¹¹³ Judges, VIII., 7.

¹¹⁴ Judges, VIII., 16.

¹¹⁵ I. Kings, XII., 11.

¹¹⁶ 2 Samuel, VIII., 2.

brought the children of Ammon out from the cities and not only scourged them with thorns and knotted sticks, with iron pikes in the sticks, but subjected them to saws and arrows of iron and made them to pass through the brick kiln.¹¹⁷

The Bilboes, were used in Spain and England, at an early day, for slanderers and other petty offenders. By means of this instrument, the culprit was held with his feet aloft, on his back, exposed to the public gaze and ridicule of the passers-by.

The American Colonists made frequent use of this instrument of punishment and we read that in good old Massachusetts, in August, 1632, one "James Woodward was sett in the bilbowes, for being drunk at the Newetowne," the name Cambridge then went by.¹¹⁸

The Ducking-stool, a stool or seat, arranged at the end of a rope tied to a long pole, so it could be lowered into the water, was used as a punishment for "scolds" and "slanderers" in old England and by the early American Colonies. Virginia, Maryland and other of the American Colonies, provided for the use of the ducking-stool and other similar correctionary punishments, by statutes.¹¹⁹

As late as the year 1811, in Georgia, one Miss Palmer was sentenced to be ducked, as a scold or slanderer, in the Oconee River¹²⁰ and in Washington, according to the interesting book on "Curious Punishments of By-

¹¹⁷ 2 Samuel, XII., 31.

¹¹⁸ "Curious Punishments of By-Gone Days," by Alice Morse Earle, p. 5.

¹¹⁹ "Curious Punishments of By-Gone Days," by Alice Morse Earle, pp. 17, 20.

¹²⁰ *Ante idem*, p. 25.

Gone Days," by Alice Morse Earle, almost in our own day, Mrs. Anne Royal, Editor of the "Washington Paul Pry," was sentenced before Judge William Cranch to suffer punishment by being ducked in the Potomac River.¹²¹

The Stocks graced each parish, in England, at an early day and along with the *pillory* and the *rack*, were used on different classes of petty criminals. Many criminals were also punished by the American Colonists by use of the stocks and the pillory, and in Massachusetts, New Hampshire, Virginia and Maryland, the manners and morals of many an early patriot were mended by the use of these instruments.¹²²

The Rack was a wooden framework, in which the culprit was fastened and by means of ropes and pulleys his arms and legs were violently stretched and pulled until the tension caused the most intense pain and frequently the bones were broken by the use of this fearful appliance. According to Lord Coke, the appliance was first introduced into the Tower, in England, by the Duke of Exeter, in 1467, and for this reason it was called, "The Duke of Exeter's Daughter." The Tower rack was in the long vaulted dungeon below the Armoury and continued as an instrument of torture for many centuries. During the reign of Elizabeth, it was a customary means of torture and in 1580 the Jesuit Priests concerned in the alleged Jesuit Invasion, were terribly racked to compel them to disclose the names of their leaders.¹²³

¹²¹ *Ante idem.* p. 28.

¹²² The Gentleman's Magazine, Vol. 46, p. 373; Alice Morse Earle's "Curious Punishments of By-Gone Days," pp. 29, 43.

¹²³ The Gentleman's Magazine," Vol. 46, p. 499.

Shakespeare makes frequent references to this instrument of torture, so generally used during his time, in England. Thus, in *Merchant of Venice*, Portia refers to the enforced statements of Bassanio:

"Ay, but I fear, you speak upon the rack,
Where men enforced do speak anything."¹²⁴

The Brank, known as the "Scold's bridle," was an iron hood, with a ring, around the face, with a flat tongue of iron to be placed in the mouth, over the tongue. It was applied, with the "scold" or slanderer tied in a public place, where she was subjected to the ridicule of the passers-by and was generally used to correct scolds and fussy women, for many years, in both England and America. It was used on the poor unfortunates during the Salem Witchcraft craze and many an old dame in good old England was made to bridle her tongue and desist from gossiping or hen-pecking her husband, because of the fear of the "scold's bridle" and the gag, used indiscriminately, in all such cases.¹²⁵

Fortunately, with the dawn of better days, this torture system began to decline and in most civilized countries, such "crimes against criminals" are now but curious and quaint, yet oft-times terrible and fearful examples of the customs and procedure of other days.

The strange thing is that such things lasted as long as they did in a growing, increasing world of knowledge, with men who sought the truth and attempted to attain the higher ideals and who should have been

¹²⁴ Act III., Scene, II. For many other references to this instrument of torture, by Shakespeare, see note, to section 82, in White's "Law in Shakespeare," pp. 116, 118.

¹²⁵ Alice Morse Earle's "Curious Punishments of By-Gone Days," pp. 96, 105.

imbued with the love of their fellow-man, which the sufferings and mistakes of the past had, for centuries, led them to emulate.

With the striking example in history of the horrible punishment by Crucifixion, all men now dread to think of the time when innocence and goodness could be so crucified, yet for two thousand years, in the slow evolution of the human race, other innocents and good men and women have been tortured and racked by men and women holding the superior power and authority over the masses, who through superstition and delusion, were led to endorse the cruel domination of such mis-used force.

When we stop and contemplate the enormity of "Man's inhumanity to man," as recorded in the lessons of the past, "the marvel is that man can smile, dreaming his ghostly, ghastly dream."

The basis of such misanthropy lies in the fact that criminals have been treated as enemies, to such an extent that mankind has warred upon them and committed deeds of war, when, in point of fact, the alleged criminal, frequently was less guilty than his judges, and, if guilty, he was only a mistaken man, needing correction, but not torture or death, to teach him the better path to tread. Would that future generations might be fully emancipated from the selfish creed which calls that good, which works *me* weal and holds that ill, which *me* alone doth harm or hurt.

For our lives, like ravelled skeins, cross back and forth, connect and blend,

"They change with place, they shift with
race; and, in the veriest span of Time,
Each Vice has worn a Virtue's crown; all
Good was banned as Sin or Crime."

CHAPTER XI.

WILLS, QUAIN'T AND CURIOUS.

A last will and testament is the instrument whereby one disposes of his property, to take effect after his death.¹

The right to dispose of one's property, by will, consistent with existing rules of law, is one of the results of man's social condition, based upon an instinctive sentiment, akin to self love, which looks to the preservation and alienation, according to the intent of the owner, of the individual acquisitions, resulting from personal endeavor.

There is a vast amount of interesting information, in connection with the history and forms of antique wills, and testamentary dispositions of property, in one form or another, are of extremely ancient origin.²

Historians and law writers have told us that the will, as we know it, is a Roman invention, but in this statement the testimony of others is accepted as establishing the fact, rather than the knowledge, or want of knowledge of the fact asserted. Indeed, writers are frequently given to accepting and repeating the statements of others, without investigating the facts upon which such statements are based, much as the court did, that decided that a given windstorm was not a cyclone, where the conclusion was based wholly upon the evidence showing that the clouds lacked the funnel shape

¹ 1 Redfield, on Wills, Ch. II., p. 4; 2 Bl. Comm. 499.

² Redfield, on Wills, Ch. 1, p. 1; Harris, Ancient Wills. Introd. XII.

and circling motion, while the effect of the storm, evidenced by the twisted trunks of giant trees, the houses awry and other primary evidence of the fact asserted, was wholly over-looked, in reaching the conclusion.³

There is evidence that wills were used in Egypt centuries before they were known in Europe;⁴ Solon is said to have introduced them into Greece,⁵ and wills were used in Rome, long before the date of the Twelve Tables.⁶

Abraham, in his lament of the want of a legitimate heir, appointed the steward and servant born in his house to take his estate, after his death and this was, virtually, the appointment of an heir by will.⁷ And

³ Judge John F. Philips advised the writer that an opinion was prepared by a member of the federal court and submitted to him for his concurrence when he was on the bench, in a case similar to that referred to in the text, but it was changed when the attention of the writer was called to the existings facts, which the opinion failed to note. It is to be regretted that historians and law writers cannot so amend their works.

⁴ Harris, *Ancient Wills*, p. 12.

⁵ Plutarch's *Life of Solon*; IV. Kent's Comm. 503.

⁶ Chitty's note, to 2 B. Comm. 491.

The reason for recognizing, in law, a right of disposition of property by will, is the same as the law governing the descent and distribution, in case of intestacy. If there were no such provision, on the vacancy of the property, on the death of the last owner, an unseemly scramble would result, which would be both undesirable and contrary to a sound public policy. "Title," or authority to make a will, is thus based upon the social instinct and both wills and intestacy statutes are in furtherance of this purpose. The owner, in case of a testamentary devise and the State, in case of intestacy, as a mediary, accomplish practically the same purpose, in the division of property, the prevention of a vacancy and the failure of the social instinct, which furnishes the foundation for society and order. (See interesting Essay by Professor Bigelow, in III. *Essays in Anglo-American Legal History*, pp. 776, 778.)

⁷ Genesis, Ch. XV.

the Hebrew Patriarch, Jacob, before taking his departure from his sons, with the knowledge of approaching death, said unto Joseph:⁸

“Behold, I die; but God shall be with you and bring you again unto the land of your fathers. Moreover, I have given to thee, one portion above thy brethren, which I took out of the land of the Amorite with my sword and with my bow. And Jacob called unto his sons and said, gather yourselves together, that I may tell you that which shall befall you in the last days.”

Of course this is but an oral bequest, but it has all the elements of a death-bed disposition, made under the apprehension of approaching death and it sets forth the “portion” to Joseph, after mentioning the derivation of the testator’s title, and the symbolic emblems to the other sons are distributed, with all the solemnity of a will, in fact.

From these illustrations, it will be seen, that from the beginning of the history of man, as we know him, or at least in the patriarchial days of the ancient Hebrews, the custom obtained of making testamentary dispositions of property, and there is also evidence extant that this custom was not confined alone to the ancient Israelites.

An Egyptian will, dating back to patriarchial times, was recently unearthed at Kahun, by the English Egyptologist, William Petrie.⁹ By this document, written 2548 B. C. one Sekrehen, a citizen of the time of Amenemhat IV, settles upon his wife, Teta, all the property given him by his brother, for life, with a condition against the commission of waste, and one Siou, a lieu-

⁸ Genesis, 48 and 49 Chapters.

⁹ Harris, *Ancient Wills*, p. 12.

tenant, is appointed guardian for the infant children. Two scribes attest the execution of this will in solemn form and thus we have the indisputable evidence, by this document executed forty-six hundred years ago, that the statement of modern historians that wills are of Roman origin and were invented by the clergy of mediaeval times,¹⁰ is in error.

The written will of the Assyrian monarch, Sennacherib, assassinated in the year 681, B. C., is preserved in the royal library of Kenyunkik¹¹ and in the form customarily used in that period, he bequeathed to his son, Esarhadden, his bracelets, coronets and other gifts of gold, ivory and precious stones, deposited, for safe-keeping, "in the temple of Nebo."

The will of the philosopher, Plato, 348 B. C., who left "no debts," but devised his farms, with a provision against alienation,¹² to his son, Adimantes, together with his vase, gold, cash, slaves, "also all my chattels, as specified in an inventory, held and possessed by Demetrius," is a model of brevity and concise legal form, such as the experienced lawyer of today would have prepared for his client.

The will of the great Aristotle, who, at sixty-eight entered upon his final long sleep of death, in the year 322 B. C., after appointing Antipater his executor, with other named friends to assist him in the management and care of his estate, proceeds to dispose of his acquisitions, in a most reasonable business-like manner, from the provision for his daughter, in case of her

¹⁰ I. Reeve's *History English Law*, 313; II. Pollock and Maitland's *History English Law*, p. 314.

¹¹ Harris, *Ancient Wills*, p. 13.

¹² Harris, *Ancient Wills*, p. 14.

marriage, including the disposition of his various slaves, the finishing of his statues and the depositing of the bones of his wife, Pythias, in his tomb, "even as she' desired," to the final arrangements for the offering of the four stone animals, for the preservation of Nicanor, to Jupiter and Minerva, is just such a sane, sensible testamentary provision as one would expect from such an astute philosopher.¹³

Virgil died ten years before Christ and his will left his manuscript of the *Aeneid* to his friends and executors, Tucca and Varus, and divided his property between his half-brother, Proculus and Valerius, after leaving a fourth to Augustus, a twelfth to Macaenas and the rest to Varus.¹⁴

But we cannot devote more space in this chapter to the wills of the most gifted of men of this ancient period, however interesting it would be to follow the testamentary devises of the statesmen, poets and philosophers of the period before Christ, but to trace the origin and growth of English wills, with a few illustrations of the quaint and curious, will sufficiently lengthen the scope of the present subject-matter.

Forms of testamentary disposition of personalty obtained in Great Britain at a very early period,¹⁵ but until the Statute of Wills, in 1540,¹⁶ there was no right of disposition by will, in England, on the part of the owner of real estate.¹⁷

¹³ Harris, *Ancient Wills*, pp. 15, 16.

¹⁴ Harris, *Ancient Wills*, p. 16.

¹⁵ 2 Bl. Comm. 491.

¹⁶ 32 & 34 Henry VIII.

¹⁷ I. Redfield, on Wills, sec. 4, p. 2; II. Pollock and Maitland's *History English Law*, p. 315; IV. Reeve's *History English Law*, 510, 511.

The Anglo-Saxon will is not a product of the Roman will at all, but is purely a creature of the manners and customs of the English people themselves.¹⁸ In the early Anglo-Saxon law wills were unknown, but owed their origin to the privilege accorded the crowned heads and great ones to make testamentary disposition and death-bed gifts of their property.¹⁹ In Cnut's day it was not unusual for a man to make a post obit gift of his land or goods, and after the Norman conquest this custom continued and one could dispose of his land, after his death, by a charter, effective upon his own death, or that of his wife,²⁰ but the testamentary devise, as we know it, was not a common instrument in this day.

After the middle of the thirteenth century the king's court condemned the post obit gift of land, by charter, but allowed it only in certain boroughs where the custom obtained; primogeniture was held to destroy the existing law of succession; the church asserted the right to execute the last will and testament of every person and the horror of intestacy increased, as the church assumed the right to administer the goods of the deceased, for the good of his soul.²¹

We read, in the old books, that a great man, Eude, died in Normandy, during the reign of Henry I, and made a certain division or devise of his property, leav-

¹⁸ II. Pollock and Maitland's History English Law, pp. 316, 317.

¹⁹ II. Pollock and Maitland's History English Law, p. 322.

²⁰ *Ante idem*, p. 323.

²¹ II. Pollock and Maitland's History English Law, pp. 325, 326.

The statute of wills ordained that all persons having manors, lands, tenements or hereditaments could give and dispose of them, as well by last will, or testament in writing, as by any act executed in their lifetime. (IV. Reeve's History English Law, p. 374.)

ing his manor to the abbey he had built at Colchester, with a hundred pounds and a gold ring, together with a cup and horse and mule; but before the King would confirm the devise of the manor, he compelled the surrender of the cup, horse and mule to the Crown.²²

And the post obit gift to Walden Abbey attempted by William de Mandeville, Earl of Essex, during the reign of Henry II was also set aside by Goeffrey Fitz Peter, one of Glanville's successors as Chief Justiciar,²³ under Henry II, and his successor.

Of course the church-men frequently procured confirmations from the heirs of these post obit gifts of land to the church, by the threat of a dying father and the disapprobation of the church, if the gift was not confirmed, but in the law these gifts were not recognized, for, as Glanville puts it, in this period it was an axiom of the law that "God alone and not man can make an heir."²⁴

Glanville speaks of the probate of wills, as if that mode of authenticating these documents had been long in use, when he wrote, but just when this custom was crystalized into law, in England, it is difficult to determine.²⁵ In the reign of Henry III the ecclesiastical courts assumed jurisdiction in the probate of wills and soon thereafter attempted quite generally to enforce the execution of them in payment of legacies, for since the reign of Henry I, the estate of one dying intestate, was subject to division by those succeeding

²² II. Pollock and Maitland's History English Law, p. 326.

²³ II. Pollock and Maitland's History English Law, p. 327.

²⁴ *Ante idem*; Beame's Glanville, p. 118.

²⁵ I. Reeve's History English Law, p. 313.

thereto, *pro anima ejus*.²⁶ The church seemed best suited to make this division, for the benefit of the intestate's soul and this finally gave rise to the grant of letters by the ordinary to the next of kin, from which the custom of issuing letters of administration no doubt arose, in after-times.²⁷

The church continued to execute the powers concerning wills and the estates of decedents—and this is no doubt the reason why Glanville and Bracton do not treat at length of wills, further than to mention the custom, in certain boroughs, of devising land by will²⁸—until the people complained of oppression by the bishops and ordinaries in the exaction of fines for probating wills, when the statute of 31 Edward III, was enacted, giving the justices of the king's court jurisdiction to enquire into such exactions and oppressions, either at the instance of the king, or that of the injured person.²⁹

Having thus assumed the jurisdiction over the estates of deceased persons, by this statute, which was the entering wedge to oust the jurisdiction of the ecclesiastical courts, in the gradual processes of time, the courts learned in the law, instead of those concerned only about spiritual affairs, assumed larger control and jurisdiction over the estates of decedents. While the church retained control over the estates of decedents, the bishop exercised practically the same authority that the probate judge exercises under our law, in the granting of letters of administration, the listing

²⁶ I. Reeve's History English Law, p. 313.

²⁷ I. Reeve's History English Law, p. 314.

²⁸ III. Reeve's History English Law, 215.

²⁹ III. Reeve's History English Law, 125.

and inventorying of the property and the accounting by the trustee to the ordinary, granting the letters of administration.³⁰

From the delegation of the trust to some personal friend to carry out the will of the decedent, the clergy, in compelling fidelity in the performance of the trust, no doubt developed that particular kind of a trustee known to our law of today as an executor or administrator and with the appearance of this legal personality, the devise may be said to first legally assume the dignity analogous to our present testamentary devise.³¹

One of the earliest wills, with executors, that the older books refer to, is that of King Henry II,³² made at Waltham, in the year 1182 in the presence of ten witnesses, among whom we note the name of Ranulf Glanville, his justiciar, the author of the first English law book. The English bishops and Glanville were to make division among the religious houses of five thousand marks; Norman bishops were to make division of certain sums among Norman eleemosinary institutions; his sons were charged with the distribution of a fund to be expended in providing marriages for poor free women; God's curse was invoked upon all those who violate his laws and the Pope was said to have confirmed the devise, no doubt because all the legacies were for pious purposes. The will, however, had executors,³³ for one set of the trustees looked after the English behests; another set after the Norman legacies; others,

³⁰ IV. Reeve's History English Law, 123, 124.

³¹ II. Pollock and Maitland's History English Law, p. 335.

³² Nicholas' "Testamenta Vetusta."

³³ II. Pollock and Maitland's History English Law, pp. 334, 335.

still, those left to institutions in Maine and Anjou, and all of these several executors, save only Glanville, were from among the clergy, and this evidences the high regard in which this monarch held his learned justiciar.

But few of the thirteenth century wills have come down to us, although we have an ampler supply in the fourteenth century. In the thirteenth century, the will was usually made in Latin and wills written in the English language first began to appear generally in the second half of the fourteenth century.³⁴

In the year 1268, or the 53 year of Henry III, William de Beauchamp executed a will³⁵ that looks very like the modern documents, except that it only provided for specific legacies and behests of personalty other than to the church. It provided that his horse, fully harnessed, with all military caparisons, should precede the hearse bearing his corpse; provided for masses for his soul; gave a house to the church for his own soul and that of his wife; a behest to his son, Walter, to defray his expenses in a pilgrimage to the holy-land; to his daughter, Joane, a canopy and a book of Lancelot; a silver cup to his daughter Isabel, rings for his friends, with small legacies to others and a house for the church, are the principal features of this ancient will. The testator finally closed this interesting old will, in the following form:

“And I appoint my eldest son, William, Earl of Warwick, Sir Roger Mortimer, Sir Bartholomew de Sudley, and the Abbots of Evesham and of Great Malverne, my executors.”

³⁴ II. Pollock and Maitland's *History English Law*, p. 337.

³⁵ Harris, *Ancient Wills*, p. 22.

So here we have, in modern form, the recognition of the custom to appoint executors, by testamentary devise, just as today.

Primogeniture, under the feudal law of the middle ages, in England, created the necessity for wills of real estate, for although all children of the Germanic races took equally and this was true, at Rome, under the feudal law all the children were practically disinherited in favor of the eldest son; some method of devising the estate to the eldest son was essential, on the part of the testator of real estate, so the Clergy adopted the Roman will as the instrument for accomplishing the purpose and thus it is sometimes called "an accidental fruit of feudalism."³⁶

The liberty taken by the Church with the estates of deceased persons was a matter of such scandal and oppression, during the reigns of Henry III and Edward III, that Parliament on several occasions imposed rules for the government of the bishops in the administration of the estates of intestates. Executors were required, during the reign of Henry III, to make a true inventory of the property of the deceased, and exhibit it to credible persons, acquainted with the property of the deceased,³⁷ and this is no doubt, the foundation for this provision of our modern law, requiring inventories, in such cases.

During the reign of Edward IV the *testamentum* and *ultima voluntas* came to be regarded in much the same legal aspect, although the former was the more solemn

³⁶ Maine, *Ancient Law*, ch. 7, p. 217; III. *Essays in Anglo-American Legal History*, pp. 780, 781.

³⁷ IV. Reeve's *History English Law*, p. 115.

act and the execution of the testament was always in accordance with the forms prescribed in the older law books and if these preliminaries were omitted it was but a mere *ultima voluntas*.³⁸

In the reign of Edward VI the reformers of that period objected to the promiscuous use of wills by all classes, so an act was passed preventing the execution of wills by wives, *servi*, by minors under fourteen, by heretics, criminals, condemned to death, exile, or chains; those who did not dismiss their concubines before they were in extremis, people with two wives or husbands, libelers, prostitutes or procuresses and usurers. The indulgence was granted to those keeping concubines, however, and to those with two wives or husbands—perhaps because of the leniency with which such crimes were looked upon at this period—of disposing of their goods *in pias causas*, or for the relief of the poor, afflicted, for young women, the support of students and the reparation of highways.³⁹

Under the old law, the division of the decedent's property, whether by will or otherwise, was one-third to his wife, a third to his children and the other third, the owner himself could dispose of. If no will was left, the wife and children took their one-third each and the rest was divided by the administrator. If no children survived, the widow took half and the owner could dispose of the other half, or, if the owner died intestate, the administrator disposed of the remaining half and the same was true, if there were no children, but a widow survived.⁴⁰

³⁸ IV. Reeve's History English Law, 117.

³⁹ V. Reeve's History English Law, pp. 81, 82.

⁴⁰ V. Reeve's History English Law, p. 82.

The modern statutes of descents and distributions, in the United States, are no doubt founded upon the customs, which had taken the fixed form of law, at this early period of English history.

In the written English wills that have come down to us, from the middle ages, we find the dispositions of property governed, largely, by the customs and laws of the period when the will was written and the forms and dispositions of property devised by these instruments is as varied as the imaginations and whims of the testators.

The will of Guy de Beauchamp, Earl of Warwick, dated at Warwick Castle, Monday, next after the feast of St. James, the Apostle, 1315, provided for the interment of his body in the Abbey of Bordsley, without funeral pomp. To Alice, his wife, he left a portion of his plate, a crystal cup and half his bedding, with all the books in his chapel; to his daughters, he left the other half of his bedding, rings and jewels; to his son, Thomas, he left his best coat of mail, helmet and suit of harness, and to his son, John, he left his second best coat of mail, helmet and harness, and the remainder of his armour, bows, and other warlike implements were to remain in Warwick castle, for his heir.⁴¹

Noticeable among the wills of the fourteenth century is the specific provision for the place and manner of the interment of the body of the deceased. The testators of this period of the world's history, prompted by their superstition, wrote their wills as if they thought that the angel of the Lord, on the resurrection day, would

⁴¹ Harris, *Ancient Wills*, p. 25.

scan their wills, to find the place of their interment. They talked "of graves, of worms, and epitaphs," just as the Great Bard makes the weak King Richard speak, who had naught to bequeath, save his deposed body "to the ground."⁴²

We find that old John of Gaunt, Duke of Lancaster, in 1399, directs, in his will,⁴³

"If I die out of London, I desire that the night my body arrives there it be carried direct to the Friars Carmelites, in Fleet Street, and the next day be taken straight to St. Paul's, and that it be not buried for forty days, during which I charge my executors that there be no embalming of my corpse."

Sir Walter Manney, on St. Andrew's day, in 1371, in London, provided for his interment, "at God's pleasure," in the midst of the Quire of the Carthusians, near Smithfield, in the suburbs of London, without any great pomp. He directed twenty masses be said for his soul and that every poor person attending his funeral, be given a penny to say a prayer for his soul and the remission of his sins. He left ten pounds to his sister, the nun, Mary; left a provision for each of his two bastard daughters and to his dear wife, the plate which he bought of Robert Francis, also a girdle of gold, a garter of gold and all of his beds and girdles, except his folding bed, which he left to his daughter of Pembroke. He willed that a tomb of alabaster with his own image thereon, as a knight and his arms thereon should be constructed, like unto that of Sir John Beauchamp, at Paul's London, and that prayers should be said for his soul and also for that of Alice de Henalt,

⁴² King Richard II., Act II., Scene, 1.

⁴³ Harris, Ancient Wills, p. 25.

the Countess Marshal and Sir Guy Bryan, Knt., was appointed executor of his will.⁴⁴

Queen Katherine of Aragon, wife of Henry VIII, who died in 1536, after providing for the burial of her body in the Convent of Observant Friars, supplicated the King in her last will,⁴⁵ to return the property that she had brought to him from Spain, out of which she stipulated for the payment of the annual wages due her physician, her druggist, her laundress, goldsmith and tailor; she left the collar of gold she had brought from Spain to her daughter and provided for masses for her soul and legacies to different priests and lady friends.

Harris, in his recent book on "Ancient, Curious and Famous Wills,"⁴⁶ reproduces, verbatim, many curious and strange testaments, evidencing the weaknesses, humors, whims and caprices, and sometimes, even the vengeance of the various testators, whose wills he has collected.

William Pym, for instance, a gentleman of Somerset, England, who crept to his long sleep of death on January 10', 1608, after providing for different charitable behests, thus speaks of his wife, in his will:⁴⁷

"I give to Agnes, which I did a long time take for my wyfe—till she denyd me to be her husband, all though wee were marryd with my friends' consent, her father, mother, and uncle at it; and now she sweareth she will neither love mee nor evyr bee perswaded to, by preechers, nor by any other, which hath happened within these few years. And Toby Andrewes, the be-

⁴⁴ Harris, *Ancient Wills*, p. 29.

⁴⁵ Harris, *Ancient Wills*, p. 39.

⁴⁶ Published by Little, Brown & Co., 1911.

⁴⁷ Harris, *Ancient Wills*, p. 87.

ginner, which I did see with mine own eyes when he did more than was fitting and this, by means of others, their abettors. I have lived a miserable life this six or seven years, and now I leve the revenge to God—and ten pounds to buy her a gret horse, for I could not, this menny years, please her, with one gret enough.”

Dispositions of property for the use and benefit of horses and other domestic animals are not uncommon, in the list of quaint and curious wills to be met with by the student of ancient testaments.

Harris cites the curious will of a childless peasant, who died near Toulouse, in 1781, by the terms of which he left his house and land and other property to his riding horse, in these words:

“I declare that I appoint my russet cob my universal heir, and I desire that he may belong to my nephew, George.”

Upon the will being brought before the court for construction, it was held that the intent of the testator would be given effect and the horse and the bequests he had bestowed upon it, would go to the nephew named in the will.⁴⁸

Madame Dupuis, who died in 1677,⁴⁹ left a legacy of a fixed amount to her executor, with a detailed menu for her cats, which her sister and niece were to visit three times a week to see that at least thirty sous a week were expended for their living and care.

As an illustration of the generosity and magnanimity of certain Jews, the will of the wealthy Israelite, Pinedo, who died at Amsterdam, in the eighteenth

⁴⁸ Harris, *Ancient Wills*, p. 94.

⁴⁹ *Ante idem*, 101.

century, is not without interest. He left to the city of his adoption, five tons of gold; to every Christian church in Amsterdam and at the Hague, the sum of 10,000 florins each; to each Christian orphanage in these two towns, 10,000 crowns; to the poor of Amsterdam, forty shiploads of peat; to his synagogue two and a half tons of gold; he lent to the government, at three per cent, ten tons of gold, on condition that the interest should be paid to the Jews domiciled at Jerusalem; he then left certain legacies to his wife and nephew and other members of his family and to every unmarried person of either sex, attending his funeral, 100 florins; to every Christian priest at Amsterdam and the Hague, 100 crowns and to every sacristan, fifty crowns.⁵⁰

Space will not permit the long list of charitable and philanthropic devises that could be collated from ancient and mediaeval times, which many of the testators of today would do well to emulate.

John Wardell, of London, by his will dated August 29', 1656, devised his tenement, called the "White Bear," in trust, to light the travelers passing to and fro along the watersides.⁵¹

Charles Jones, of Lincoln's Inn, by will dated January 17', 1640, established a charitable trust for the maintenance of a house to be used as a hospital, near Pullhelly, for twelve poor men.⁵²

George Butler, of Coleshill, Warwickshire, by his testament dated September 2', 1591, gave his house

⁵⁰ Schutt's *Memorabilia Judaica*, lib. iv, cap. 18.

⁵¹ Harris, *Ancient Wills*, p. 105.

⁵² *Ante idem*, p. 105.

in trust for the lodgment of "any poor travelers" who should desire lodgment, not to exceed one night.⁵³

And Valentine Goodman, of Hallaton, England, by his will in 1684, left eight hundred pounds to be invested and the interest spent for the benefit of the "most indigent, poorest, aged, decrepit, miserable paupers."⁵⁴

Among the freakish wills collected by Harris, may be mentioned that of the nobleman of the house Du Chatelet, who died in 1280,⁵⁵ and directed that one of the pillars of the church at Neufchateau should be hollowed out and his body stood upright therein, so that the vulgar might not walk upon his corpse.

The strange request of the great English jurist, Jeremy Bentham,⁵⁶ that his corpse might be embalmed and placed in his favorite chair at the banquet table of his friends, on all occasions of state, was carefully carried out by his friend, Dr. Southwood Smith. By some scientific process the body of the philosopher and law writer was preserved, by a French artist and in his usual suit of clothes, with his broad-brimmed sombrero and his favorite walking-stick, in his old armed-chair, the lifeless body of this gifted man graced the meetings of his friends, until it was removed by Dr. Smith to University College.

The will of the great Bard of Avon, has been discussed so frequently that its terms are known to many, but as the last writing of the Poet, like everything connected with his life, it is always of interest to posterity.

⁵³ *Ante idem.* 107.

⁵⁴ *Ante idem.* p. 111.

⁵⁵ *Ante idem.* p. 123.

⁵⁶ *Ante idem.* p. 139.

The first paragraph of his will, along with the many other prayers and Bible references which he places in the mouths of his characters in the plays,⁵⁷ evidences the Poet's firm belief in Jesus Christ and the "life everlasting."

In the entailment of his real estate to the bodily heirs male of his daughters, this will evidences the most careful legal preparation and the conclusion is not unreasonable that the same discrimination which characterizes this disposition of his real estate and other property, recognized the futility of any attempted disposal of his literary productions, which lacked the attribute of property, in law, in England, until 1709.⁵⁸

His legacies to his sister and his nieces and nephews is characteristic of his deep affection for his own family; his benovolence is established by his bequests to the "poor of Stratford"; his good-fellowship and love for his friends by the many legacies for rings for his different friends; his indifference toward his wife, by the fact that he only left her his "second best bed, with the furniture," while all his landed acquisitions, with his gold and silver plate and other property were distributed among his sisters, daughters, nieces and nephews and his trust and confidence in his daughter, Susanna Hall, and her husband, John Hall, is finally established by the fact that he made them his executors and trustees.⁵⁹

The wills of the statesmen and patriots of the past

⁵⁷ For collection of the many beautiful prayers in the plays, see the interesting book by Mary A. Wadsworth, "Shakespeare and Prayer," by The Welch Publishing Co., Chicago.

⁵⁸ White's "Law in Shakespeare," p. 5.

⁵⁹ Harris, Ancient Wills, pp. 305, 309.

century, in our own country are equally interesting with those of our brothers of yesterday across the sea.

After leaving his land in Nova Scotia, with his books and the debts owing to him by his son, William Franklin, former Governor of the Jerseys, the great statesman, philosopher and patriot, Benjamin Franklin, referred to his son's part in attempting to deprive him of his property, during the war, as an excuse for not leaving him more of his estate. He left his dwelling house and three new houses, printing office, silver plate and household goods, to his daughter, Sarah Bache, and her husband, in entirety with remainder to their heirs, "as tenants in common and not as joint tenants."⁶⁰ The picture of the king of France, set with four hundred and eight diamonds, he left to his daughter, with the admonition not to use the diamonds to make ornaments for herself, so as not to thereby "introduce the expensive, vain and useless pastime of wearing jewels in this country." He desired his philosophical instruments in Philadelphia, to go to his ingenious friend, Francis Hopkinson, and by a codicil, he left his "fine crab-tree walking-stick" to his friend and "the friend of mankind, General Washington. If it were a sceptre, he has merited it and would become it. It was a present to me from that excellent woman, Madame de Forbach, the Dowager Duchess of Deux Ponts, connected with some verses, which go with it." He left a bond to his son-in-law, on the condition that he manumit and set free his negro man. This great patriot and friend of mankind, like General Washington, in his last testament, therefore, registered his opposition to human

⁶⁰ Harris, *Ancient Wills*, p. 369.

slavery, an institution that was to be finally abolished a half century later in the United States, through the efforts of the great "Emancipator."

The will of the great Chief Justice John Marshall, is declared by him to be "entirely in my own handwriting"; he left his estate equally to his only daughter and his five sons and accompanying the will is a splendid eulogy to his deceased wife, whom he characterized as the "most affectionate of mothers."⁶¹

The will of Captain Miles Standish, Longfellow's hero, was made March 7', 1656. He desired his just debts to "bee paied"; that his body should be "buried in Decent manor * * * as near as conveniently may bee to my two daughters, Lora Standish, my daughter, and Mary Standish, my daughter-in-law." His dear and loving wife, Barbara Standish, was left a third of his estate; forty pounds were left to each of four sons and to his son Josias, upon his marriage, he left "one young horse, five sheep and two heifers," with his forty pound legacy, if his estate "will bear it att p'sent." His friends, Mr. Timothy Hatherly and Capt. James Cudworth, were appointed "supervisors" of his will, for he knew that they would "be pleased to Doe the office of Christian love to bee healpfull to my poor wife and Children by their Christian Counsell and advice."⁶²

The "Father of our Country," General George Washington, left the bulk of his estate to his wife, Martha Washington, for life,⁶³ with the "liquors and

⁶¹ Harris, *Ancient Wills*, p. 407.

⁶² Harris, *Ancient Wills*, p. 427.

⁶³ Harris, *Ancient Wills*, p. 439.

groceries'' on hand at his death, to dispose of as she saw fit. Upon her death he willed that all slaves owned by him, in his own right, should have their freedom and that the old and infirm and sick ones should be protected and maintained by his heirs so long as they lived and the younger ones educated and maintained the same as other poor children.

He left the fifty shares in the Potomac Company, given him for his services in the Revolutionary War, to endow a University within the limits of the District of Columbia; some of his lands were distributed among the sons of his deceased brothers; his military and state papers were left to his nephew, Bushrod Washington; he recommitted the "box of oak that sheltered the great Sir William Wallace," to the Earl of Beuban; to his brother, Charles, he left the gold headed cane left him by Dr. Franklin and among the "mementos of esteem and regard," to his many friends, are a pair of pistols to General De La Fayette. He desired that in case of any dispute over his will that the disputants select each an arbitrator, the two thus selected to agree upon a third and the finding of any two as to his intentions, he desired to be "as binding upon the parties as if it had been given in the Supreme Court of the United States."

Like Washington, and many other of the patriots of the past century, William Penn prepared his own will, in 1718, so as to cause no little concern to his friend, James Logan, as to the different constructions that could be placed upon it.

The Government of the Province of "Pennsylvania and territories thereto belonging," he devised in trust

to the Earls of Oxford, Mortimer and Powelett, "and their heirs, upon trust, to dispose thereof to the Queen" or to any other person to the best advantage to carry out the object of the devise.

He further devised to his wife, Hannah Penn; to her father, Thomas Callowhill; to his sister, Margaret Lowther; to his friends "Gilbert Heathcote Physitian, Samuel Waldenfield, John Field, Henry Gouldney, all living in England" and to his friends, Samuel Carpenter, Richard Hill, Isaac Norris, Samuel Preston and James Logan, "liveing in or near Pensilvania and their heires" all his lands, tenements and hereditaments, with "other profitts scituate, lyeing and being in Pensilvania and the territorres thereunto belonging," in trust, first for the payment of his debts, second, to convey 10,000 acres each to the three children of his son, William, a like quantity to his daughter, Aubrey, and the rest to be divided among the children of his present wife, "in such proporcon and for such estates as my said wife shall think fit." His wife was made executrix and all his personal estate was left to her.

Penn was a man of far more than the ordinary ability and wisdom in the customary affairs of life, but as his friend, James Logan, foresaw, from the contents of this will, which left such a large and varied estate to so many people to convey, with so little instructions regarding his intentions, it is not strange that litigation covering a period of nine years should have resulted from such a testament.⁶⁴

⁶⁴ Dixon's "Life of Penn"; Stoughton's "William Penn"; Harris, *Ancient Wills*, p. 291.

The will of Penn, and other of the earlier patriots of the United States who drew their own wills, in such manner as to cause

The searcher for the curious in testaments, will find wills in poetry as well as in prose, collated in Harris' *Ancient Wills*.

William Jackett, of the parish of St. Mary, Islington, died in 1789 and his will in the following form was admitted to probate:

"I give and bequeath,
When I'm laid underneath,
To my two loving sisters most dear,
The whole of my store,
Were it twice as much more,
Which God's goodness has given me here.

And that none may prevent
This my will and intent,
Or occasion the least of law-racket,
With a solemn appeal
I confirm, sign and seal

This, the true act and deed of Will Jackett."⁶⁶

protracted litigation, suggests the old poem, tuned to the toast of a century ago, "The lawyer's best friend—the man who makes his own will," inscribed to "The jolly testator who makes his own will."

"He premises his wish and his purpose to save
All dispute among friends when he's laid in his grave;
Then he straightway proceeds more disputes to create
Than a long summer's day would give time to relate.
He writes and erases, he blunders and blots,
He produces such puzzles and Gordian knots,
That a lawyer, intending to frame the thing ill,
Couldn't match the testator who makes his own will.

* * * * *

You had better pay toll when you take to the road,
Than attempt by a by-way to reach your abode;
You had better employ a conveyancer's hand,
Than encounter the risk that your will shouldn't stand.
From the broad beaten track, when the traveler strays,
He may land in a bog, or be lost in a maze;
And the law, when defied, will avenge itself still,
On the man and the woman who make their own will."

For reproduction of this quaint poem in full, see, Harris, *Ancient Wills*, p. 209.

⁶⁶ Harris, *Ancient Wills*, p. 67.

William Hicklington, who dubbed himself, the Poet of Pocklington, penned his will in rhyme, in 1770, as follows:

"Do give and bequeath,
As free as I breathe,
To thee, Mary Jarum,
The Queen of my Harum,
My cash and my cattle,
With every chattel,
To have and to hold,
Come heat or come cold,
Sans hindrance or strife,
Though thou art not my wife,
As witness my hand,
Just here as I stand,
The twelfth of July,
In the year seventy."⁶⁶

Apropos this will, is the rhymed testament of the sacriligious Irishman, who, as the old books record, in this quatrain disposed of his earthly effects:

"In the name of God, Amen:
My featherbed to my wife Jen;
Also my carpenter's saw and hammer;
Until she marries; then, God damn her."⁶⁷

This, however, suggests the "Will in literature," and in turning over the pages of the work above referred to, the "Lesser Testament," of the plaintive poet, Francois Villon, who died in 1484, is not without interest.

His gloves and silken hood are bequeathed to a friend in the following verse:

"Item, my gloves and silken hood
My friend Jacques Cardon, I declare,
Shall have in fair free gift for good;
Also the acorns willows bear
And every day a capon fair
Or goose; likewise a tenfold vat
Of chalk-white wine, besides a pair
Of Lawsuits, lest he wax too fat."

⁶⁶ Harris, *Ancient Wills*, p. 67.

⁶⁷ *Ante idem*. 68.

He desired his friends to record of him in his epitaph:

"Acre or furrow had he none.
'Tis known his all he gave away;
Bread, tables, tressels, all are gone,
Gallants, of him this Roundel say."⁶⁸

Among the wills in fiction and poetry, collated by Mr. Harris, in his recent work,⁶⁹ are those of Olivia, in *Twelfth Night*; that of Don Quixote; the wills of Dickens, George Eliot, Dumas and other English writers. But it is not the object of this chapter to deal with wills in fiction, since testaments are founded in certainties, as real as life and death themselves. We have always made our wills in pursuance of a natural inclination, associated with the idea of property and intimately connected with the ties that bind us here on earth. As Hazlitt said, a century ago:

"We consign our possessions to our next of kin, as mechanically as we lean our heads on the pillow and go

⁶⁸ Harris, *Ancient Wills*, p. 64.

⁶⁹ Harris, *Ancient Wills*, pp. 49, 62.

This bequest of Francois Villon, may have suggested to Mr. Williston Fish of Chicago, the "Insane Man's Will," published in *Harper's Weekly*, in 1898, wherein he makes an imaginary will that has become a classic in English literature, among the bequests being "all good little words of praise and encouragement," to good fathers and mothers, in trust for their children; to children, subject to the rights of lovers, he devises, the flowers, the banks of brooks, the blossoms of the woods, the golden sands and waters of the brooks, the white clouds floating high over the giant trees and the Milky Way, to wonder at, at night; to lovers, he devises the imaginary world, with the stars in the sky, the red roses by the wall, the sweet strains of music and all else by which they may figure to each other the lastingness and beauty of their love. To those no longer children or lovers, he bequeaths the pleasures of sweet memories, the poems of Burns and Shakespeare and other poets, and to those with snowy crowns he leaves the happiness of old age, with the love and gratitude of their children, until they fall asleep.

out of the world in the same state of stupid amazement that we came into it."

And as certain as we are to die, so certainly do we owe it to ourselves and to those who are the objects of our bounty, to provide for the proper disposition of our acquisitions, even as the men and women of antiquity did, before they pressed the pillow for the last time.

The hands that wrote the wills referred to in the foregoing pages have been stilled with the silence of the centuries, e'en as the fingers that wove the figures in your antique rug; the voice that expressed the dying intent of the testator, like the nightingale that sang among the trees—ah, "whither hath it gone again, who knows" can be heard again no more. Like scattered threads from the warp and woof of the lives from which these skeins are taken, each age-scented document marks the close of a human life and the fact that other lives have fallen, like the leaves from trees, but emphasizes the pathos of our lives, since humanity, as one man, with a universal agony still strives and strains "to gain the goal where agonies shall cease to be." Streams have been wept into the vast ocean of time since the first will and testament was made by dying man.

"A myriad races came and went; this Sphinx hath seen them come and go."

True, a human life, is but "a drop in ocean's boundless tide," but as truly said by Burton:⁷⁰

"Our deaths are twain; the Deaths we see
Drop like the leaves in windy Fall;
But ours, our own, are ruined worlds, a globe
Collapst, last end of all.

⁷⁰ "The Kasidah."

We live our lives with rogues and fools,
 Dead and alive, alive and dead,
 We die 'twixt one who feels the pulse and
 One who frets and clouds the head.

Hardly we learn to wield the blade, before
 The wrist grows stiff and old;
 Hardly we learn to ply the pen, ere Thought
 And Fancy faint with cold.

And still the weaver plies his loom, whose
 Warp and woof is wretched Man
 Weaving th' unpattern'd dark design, so dark
 We doubt it owns a plan.

But ah, what vailleth man to mourn; shall
 Tears bring forth what smiles ne'er brought;
 Shall brooding breed a thought of joy? Ah
 Hush the sigh, forget the thought.

Silence thine immemorial quest, contain
 Thy nature's vain complaint
 None heeds, none cares for thee or thine;
 Like thee how many came and went.

* * * * *

Wend now thy way, with brow serene, fear
 Not thy humble tale to tell:—"'
 'Tis wisdom's part to make thy will;
 The testament is not death's knell.

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